85-1342

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO PARK DISTRICT, *et al.*,

Petitioners,

v.

SILAS J. ALEXANDER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether local government employees may avoid the comprehensive remedial scheme of Title VII, 42 U.S.C. §§ 2000e to 2000e-17, by utilizing 42 U.S.C. § 1983 to redress employment discrimination claims which are cognizable under Title VII.

PARTIES BEFORE THE COURT OF APPEALS

The Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh, all petitioners herein, and William A. Lee were named as appellees before the court of appeals.

The appellants below were Silas J. Alexander and others*, respondents herein.

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* The other appellants who were named-plaintiffs before the district court are Karen Turner, Renee Bradford, Lillian Schrean, Joel Alexander, Earline Oglesby, Martha McGee, Althea Tucker, Rosemary Garrett, Latoski McCarthy Dillon, Beverly Gray, Anthony Gray, Arlene Gaston, Willie Gaston, Angel Gomez, Juan Gomez, Luis Diaz, Luis Flores, Comite Latino, Clara Evans, Christopher Delano Barnett, Oscar Wells, Terry Lee Fisher, Agnes Bernaugh, William Hall, Charles Adkins and Natalie Lyle.

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Petitioners Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh respectfully pray that a writ of certiorari issue to review a portion of the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The original opinion of the court of appeals is reported at 773 F.2d 850. The court of appeals' November 13, 1985 correction of the original opinion, which was not incorporated

into the reported advance sheets, appears in the Appendix hereto, which is separately bound. The district court's order, which was not reported, also appears in the Appendix. A prior interlocutory appeal to the court of appeals is reported at 709 F.2d 463 and a pretrial ruling of the district court is reported at 548 F.Supp. 277.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1985. The court of appeals denied petitioners' timely petition for rehearing by order entered on November 13, 1985. This petition for certiorari was filed within ninety (90) days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend XIV, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. §§ 2000e to 2000e-17 is too lengthy to set out here. The complete text appears in the Appendix.

STATEMENT OF THE CASE

The controversy herein centers on whether the respondents ("Alexander") may utilize 42 U.S.C. § 1983 ("Section 1983") to redress their claims of discrimination in their employment with the Chicago Park District, a local government entity, despite the fact that 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII") provides a specific and comprehensive remedial scheme which fully redresses all of Alexander's claims.

This action began in 1979, when Alexander filed a class action on behalf of all black, Hispanic and poor Chicago residents against the Chicago Park District, its attorneys, superintendent, and past and present commissioners (collectively "Park District"). Alexander invoked the district court's jurisdiction under 28 U.S.C. § 1343(a)(3). Alexander made several amendments to his complaint, ultimately asserting four counts against the Park District in his third amended complaint, all of which were brought under Section 1983. Count I alleged that the Park District discriminated against the class of persons represented by Alexander by allocating less funds and other resources to parks located in predominantly black neighborhoods than to parks in other neighborhoods. The other three counts were also premised on the alleged discriminatory allocation of resources, but added additional allegations of discrimination. Counts II and III alleged discrimination in employment by the Park District. Count IV was a claim for personal injuries which allegedly arose out of the discriminatory allocation of resources alleged in count I.

Count I was tried in 1983, in a jury trial which lasted more than three months. Tried at the same time were all claims in the companion case of *Midwest Community Council, Inc. v. Chicago Park District*, No. 79 C 3187 (N.D. Ill., September 16, 1983), in which the plaintiffs asserted similar claims of racial discrimination in the allocation of resources by the Park District. On August 17, 1983, a jury returned a verdict in favor of all defendants and against all plaintiffs in *Alexander*, and the district court entered judgment on the verdict. Appendix at 42a. Subsequently, the court entered judgment in favor of the Park District in the companion case of *Midwest* and issued its own findings of fact and conclusions of law for that case. No appeal was taken from the *Midwest* judgment.

On August 29, 1983, Alexander filed a motion pursuant to Federal Rule of Civil Procedure 59 asking for the entry of an order amending the judgment or granting a new trial. On September 23, 1983, the trial court denied the motion. Appendix at 35a. On that same date the court entered an order disposing of count IV of the third amended complaint on a summary judgment and dismissing, under Federal Rule of Civil Procedure 54(b), counts II and III to allow the parties to take appeal from all orders entered in the case. Appendix at 36a.

Alexander did not pursue an appeal but instead filed a fourth amended complaint in six counts. Appendix at 44a. The new complaint was also brought under Section 1983. Count I was almost identical to count I of the prior complaint, which was the subject of a three month trial. The new counts II and IV were essentially the same as counts II and III of the prior complaint. New counts III and V also alleged employment discrimination, but were based on alleged violations of federal funding regulations. New count VI restated the personal injury claims previously alleged in count IV of the prior complaint.

The Park District moved to dismiss the fourth amended complaint, asserting several grounds including *res judicata* and the failure of certain counts to state a claim under Section 1983.

The district court granted the motion to dismiss on all counts on October 18, 1984. Appendix at 16a. Counts I, V and VI of the fourth amended complaint were dismissed on *res judicata* grounds. Appendix at 30a. Counts II, III and IV, all employment discrimination counts, were dismissed on the ground that these claims were improperly brought under Section 1983. The court held that the general Section 1983 remedy was preempted in this context by the more specific and comprehensive remedial scheme provided in Title VII. Appendix at 31a-34a.

Alexander appealed and, in its order of September 19, 1985, the Seventh Circuit affirmed the dismissal of counts I, V, and VI, but reversed the dismissal of counts II, III and IV. Appendix at 12a. On November 13, 1985, upon the Park District's petition for rehearing, the Seventh Circuit corrected its earlier opinion to affirm the dismissal of count III, as well as the counts previously dismissed. Appendix at 14a-15a. This petition for certiorari asks this Court to address the Seventh Circuit's reversal of the dismissal of the remaining two claims of employment discrimination: counts II and IV.

In count II of his fourth amended complaint, Alexander charges employment discrimination under Section 1983 and purports to sue on behalf of all black residents of Chicago who have been injured by the employment discrimination alleged. Alexander asserts that this employment discrimination violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Illinois Constitution. The count addresses a Civil Service Examination given by the Park District on November 1, 1977 for the position of physical instructor which Alexander contends was not job-related. He asks the court to void the examination, grant other injunctive relief, and award money damages. Appendix at 48a-54a.

In count IV, Alexander again alleges violations of the due process and equal protection clauses of the United States and Illinois Constitutions, which he attempts to have remedied through Section 1983. He alleges that the Park District has discriminated against his class with respect to the hiring, assignment and payment of personnel. He seeks both monetary and injunctive relief in count IV. Appendix at 57a-61a.

The district court dismissed both of these counts for failure to state a claim under Section 1983. That court stated that these are both claims for employment discrimination which are actionable under Title VII. It held that Alexander may not bring an action under Section 1983 to redress what are, in effect, Title VII claims. To allow otherwise, the court stated, would permit Alexander to completely bypass Title VII's comprehensive administrative scheme "by the simple expedient of putting a different label on [the] pleadings." Appendix at 34a, quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973).

The Seventh Circuit reversed this aspect of the district court's ruling, holding that Title VII is not the sole remedy for employment discrimination claims of state employees. In so holding, the Seventh Circuit followed its own recent decision in *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985). Appendix at 10a-11a. It remanded counts II and IV to the district court. Appendix at 15a.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE SEVENTH CIRCUIT IMPROPERLY FAILS TO APPLY THE MOST ANALOGOUS AND RECENT SUPREME COURT AUTHORITY AND MISAPPLIES OTHER DECISIONS OF THIS COURT

A. Introduction

Both counts II and IV of Alexander's fourth amended complaint are claims for employment discrimination in which Alexander seeks injunctive relief, reinstatement, back pay and damages. In both, Alexander pleads that he brings the action under the Due Process and Equal Protection clauses of the Fourteenth Amendment, a section of the Illinois Constitution and Section 1983. Although the wrongful acts alleged in these claims are clearly within the scope of Title VII, Alexander has never sought to utilize any of the remedial mechanisms of Title VII. The issue presented here is whether Alexander may assert claims which are cognizable under Title VII under the guise of a Section 1983 complaint, and thereby completely bypass the Title VII administrative and judicial procedure. The district court, citing several decisions of this Court, held that he may not. The court of appeals, citing some of the same decisions, reversed the district court and held that Alexander may avoid Title VII by pleading under Section 1983. This petition asks this Court to review this issue and provide guidance on an important recurring question of federal law.

The difference between pursuing a discrimination claim under Section 1983 and pursuing a similar claim under Title VII is vast. Under Title VII, a complainant may not bring an action in federal district court unless and until he has fully pursued that claim through proper administrative channels. A complainant must first file an administrative charge with either the Equal Employment Opportunity Commission (EEOC) or a

corresponding state or local government agency. Title VII contains short express time limitations for such filings. At several different points, the statutory plan prevents the complainant from immediately filing judicial proceedings in order to encourage voluntary conciliation. The EEOC has the power to investigate and to institute its own civil proceedings. A complainant may only bring his own action upon the issuance by the EEOC of written authorization to do so. Most courts have held that Title VII does not allow a court to award either compensatory or punitive damages and that, because only equitable remedies are authorized, neither party has a right to a jury trial. *See Great American Federal Savings and Loan Association v. Novotny*, 442 U.S. 366, 373-75 (1979).

Under Section 1983, by contrast, there is no administrative aspect to the remedy. A plaintiff may proceed directly into federal district court with his claim. Unlike Title VII, under Section 1983 a plaintiff may also recover damages and demand a jury trial. *Smith v. Wade*, 461 U.S. 30 (1983). The limitation periods applicable to Section 1983 actions are controlled by state law and may be several years long. *Beard v. Robinson*, 563 F.2d 331, 334 (7th Cir. 1977), *cert. denied sub nom. Mitchell v. Beard*, 438 U.S. 907 (1978); *see generally O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914). Therefore, whether or not plaintiffs like Alexander may bypass Title VII's scheme through the use of Section 1983 has a significant effect on the conduct of the proceedings, the rights of the parties and the utilization of judicial resources.

The Seventh Circuit's reversal of the dismissal of counts II and IV is based almost exclusively on its own recent decision in *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985). The circuit court opinion in this case does not make an independent analysis of the issue presented here. Hence, this petition will make frequent reference to the *Trigg* opinion.

The holding and underlying reasoning in *Trigg* are flawed. The court in *Trigg* failed to address the two most recent and significant decisions of this Court which bear on the issue of whether Title VII preempts Section 1983 in the employment discrimination context. Both *Middlesex County Sewerage Authority v. National Sea Clammers Association ("Sea Clammers")*, 453 U.S. 1 (1981), and *Smith v. Robinson*, ____ U.S. ____, 104 S.Ct. 3457 (1984), must weigh heavily in this analysis. The Seventh Circuit's failure in both *Trigg* and this case to address these decisions renders incomplete and faulty that court's analysis of those Supreme Court decisions it did consider.

B. The Seventh Circuit Ignored The Important *Sea Clammers* and *Smith v. Robinson* Decisions Of This Court

This Court has never decided whether a plaintiff who claims discrimination in employment may bring an action under Section 1983 for what are essentially violations of Title VII. In several cases, however, this Court has faced apparent conflicts between statutes such as Section 1983, which provide general remedies for discrimination in a variety of contexts, and subsequently-enacted, detailed remedial statutes which were designed to combat the specific wrong underlying the particular claim. In those cases, which include *Sea Clammers*, *Smith v. Robinson*, *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979), and *Brown v. GSA*, 425 U.S. 820 (1976), this Court has resolved the conflict by requiring the plaintiffs to utilize the more comprehensive, specific and contemporary remedy in those situations where the remedy was available. In each case, the alternative to the position chosen by the Court was to permit plaintiffs to undermine the effectiveness and purpose of the specific remedial scheme by avoiding the scheme entirely and proceeding directly into federal court with their claims.

Perhaps the leading case in this group is *Sea Clammers*. In that case, a group of plaintiffs brought suit in federal district court against various government entities and officials to obtain injunctive and declaratory relief and damages for alleged wrongful dumping of wastes into the Atlantic Ocean. Although the issue was not raised by the parties, this Court analyzed whether plaintiffs could utilize Section 1983 to enforce their rights under the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1251-1376, or the Marine Protection, Research and Sanctuaries Act of 1972 ("MPRSA"), 33 U.S.C. §§ 1401-45. After a careful review of the provisions of each statute, this Court concluded that Section 1983 was not available. It stated that the very existence of a complete set of express detailed remedies in both the FWPCA and the MPRSA demonstrated Congress' intent to supplant both implied private actions and any remedy that otherwise would be available under Section 1983. 453 U.S. at 21. In reaching this conclusion, this Court enunciated a broad principle on the relationship between Section 1983 and statutes containing their own comprehensive remedial schemes:

> "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."
>
> 453 U.S. at 20.

Sea Clammers sets forth the principle that the proper way to determine whether Congress intended to create a private right of action under a federal statute, as well as whether Congress intended to preserve a Section 1983 remedy inconsistent with that statute's own remedies, is first to look to the language of the statute itself. 453 U.S. at 13, 20. Elaborate and comprehensive enforcement and relief provisions may, in themselves, sufficiently demonstrate Congress' intent so that resort to secondary means of statutory interpretation, such as legislative history, is unnecessary.

Another decision of this Court which has a direct and important bearing on this case and which was ignored by the Seventh Circuit is *Smith v. Robinson*. There the plaintiffs sued state officials asserting both statutory claims under the Education of the Handicapped Act ("EHA"), 20 U.S.C. §§ 1401-61, and distinct constitutional claims under Section 1983.

The plaintiffs in *Smith v. Robinson* made it clear that their Section 1983 claims were not based on alleged violations of the EHA, but on independent assertions of constitutional deprivations. 104 S.Ct. at 3468. Thus, the issue presented to this Court in *Smith v. Robinson* is directly analogous to that presented here. Alexander's claims are clearly premised on allegations of employment discrimination which are fully remediable under Title VII. Alexander frames these two counts, however, as claims of constitutional deprivations which he is attempting to remedy through Section 1983.

In *Smith v. Robinson*, this Court made the same type of analysis of the EHA as it had previously done with the statutes at issue in *Sea Clammers*. The Court found that the structure of the EHA which, like Title VII, provides a carefully tailored administrative and judicial scheme, clearly reveals Congress' intent not to allow a plaintiff to circumvent that scheme through Section 1983. 104 S.Ct. at 3470. This Court held that the EHA provides an exclusive remedy for claims cognizable under it, and that even constitutional claims asserted through Section 1983 were preempted. *Id. Smith v. Robinson* thus shows that the principle of statutory interpretation of *Sea Clammers* extends to a broad range of potential claims, including Section 1983 claims which are alleged to derive from an independent constitutional source. If those "constitutional" claims are really in effect claims cognizable under the more specific remedial statute, then they are not independent claims and Section 1983 is preempted. Whether the plaintiff chooses to label his claim as one brought under the statute itself or as an assertion of constitutional rights is therefore immaterial.

In both *Trigg* and this case, the Seventh Circuit failed to heed the directives of *Sea Clammers* and *Smith v. Robinson*. Rather than analyze the actual language and structure of Title VII itself, the Seventh Circuit reached its conclusion based almost exclusively on certain statements from the statute's legislative history. *Trigg*, 766 F.2d at 301. This Court has frequently indicated, though, that the starting point for interpreting a statute is always the statute's language, which is conclusive, and that resort to legislative history is only desirable if the statute is unclear. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *Sea Clammers* instructs that the comprehensiveness of a statute's remedies, in itself, may be enough to establish Congress' intent not to preserve an inconsistent Section 1983 remedy. 453 U.S. at 20. Title VII provides what is probably one of the most comprehensive administrative and judicial enforcement mechanisms of all federal statutes. An analysis of legislative history is therefore neither necessary nor desirable in this case.

Although no analysis of legislative history is called for here, a determination that Congress intended to preempt Section 1983 where it is in direct conflict with Title VII is consistent with the selected excerpts of legislative history relied upon by the Seventh Circuit. Title VII does not vitiate the right to assert a Section 1983 claim. What Congress did preserve, however, was the right to assert through Section 1983 only those claims which could not be brought under Title VII. This type of distinction was recognized by this Court in *Smith v. Robinson*. In that case, the Court held that a plaintiff may not bring a Section 1983 action for a claim which is cognizable under the EHA, regardless of whether the asserted basis for the claim is the EHA or the Fourteenth Amendment. 104 S.Ct. at 3470. By contrast, this Court noted that the same principle does not apply where the plaintiff asserts a truly independent

constitutional claim, such as a claim for denial of procedural due process. Since such a claim would not be inconsistent with the EHA's scheme, a Section 1983 action is available to assert that completely independent right. 104 S.Ct. at 3470-71.

If Alexander were able to assert a factually independent constitutional claim, such as the denial of procedural due process in a termination of employment, a Section 1983 action would still be appropriate. No conflict with Title VII's scheme would be presented. The claims actually made by Alexander, however, are not independent constitutional claims. Rather, those claims arose in a factual context which places them directly within the ambit of Title VII. Merely labeling those counts as constitutional claims does not make them independent claims. In the context presented in this case, Title VII supplies a complete and exclusive remedy for Alexander.

An analysis of the legislative history of one of the statutes at issue in *Sea Clammers* further demonstrates the principle that what a statute actually provides is a far more important indicator of Congress' intent than statements from committee reports or other matter extracted from legislative history. As stated above, this Court held in *Sea Clammers* that the plaintiffs could not utilize Section 1983 to assert claims cognizable under the FWPCA because of the latter statute's own comprehensive system of remedies. 453 U.S. at 20-21. The FWPCA's Senate Report, however, seems to support the proposition that a Section 1983 remedy was preserved. The Report states that one section of the FWPCA which ultimately became law would specifically preserve *any rights or remedies under any other law*. S.Rep. No. 92-414, 92d Cong., 2d Sess. 81, *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3746 (emphasis supplied); *See Sea Clammers*, Opinion of Stevens, J., concurring in part, dissenting in part, 453 U.S. at 29-30. Moreover, the enacted language of the same section referred to in the report appears to direct that the authorization

of an express remedy in the statute itself shall not give rise to an inference that Congress intended to foreclose other remedies. 33 U.S.C. § 1365(e); *see also Sea Clammers*, 453 U.S. at 29 (Stevens, J., concurring in part, dissenting in part). Thus, in *Sea Clammers*, this Court held that the structure of the FWPCA as a whole compelled a conclusion that Congress did not intend to preserve Section 1983 remedies for claims within the scope of the FWPCA, despite language in the statute and legislative history seemingly to the contrary.

The remedial devices in Title VII are even more comprehensive than those under the FWPCA. Moreover, *Title VII is completely lacking in any statutory expression of intent to preserve a remedy under Section 1983.* The Seventh Circuit's legislative history approach cannot overcome the most compelling evidence of Congress' intent. The structure and language of Title VII show that Congress did not intend to preserve a Section 1983 cause of action in the situation presented in this case.

C. The Analysis Below Of *Novotny* And *Brown v. GSA* Was Inadequate

Two additional decisions of this Court, *Brown v. GSA*, 425 U.S. 820 (1976), and *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979), also relate directly to the present case. The Seventh Circuit considered both cases in its *Trigg* opinion, but gave neither the attention it merits. In both *Novotny* and *Brown*, this Court specifically examined Title VII and determined that a more general pre-existing remedy was preempted. In *Brown*, the Court held that Title VII provides the exclusive remedy for employment discrimination for federal employees. 425 U.S. at 835. The Court examined Section 717 of Title VII, 42 U.S.C. § 2000e-16, which was added in 1972 to bring discrimination in federal employment within the scope of Title VII. The Court found that the new section established complementary administrative and judicial

enforcement mechanisms designed to eradicate discrimination. After reviewing the various elements of Section 717, this Court found the section's "balance, completeness, and structural integrity" to be inconsistent with the plaintiff's contention that Title VII was designed merely to supplement other forms of judicial relief. The Court cited the statute's carefully constructed interplay of administrative and judicial enforcement powers. Quoting *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973), it held that a plaintiff may not avoid the entire Title VII remedial scheme "by the simple expedient of putting a different label on [the] pleadings." 425 U.S. at 832-33.

The Seventh Circuit in *Trigg* did note the *Brown* decision, but dismissed it as inapplicable to this case because *Brown* construed only that section of Title VII which relates to federal employees. 766 F.2d at 301. The many parallels between that section and the rest of Title VII, however, militate against such a casual treatment of that decision.

The elements of structure this Court stated to be important in *Brown* are also found in the provisions of Title VII applicable to state and local government employees such as Alexander. In both situations, a balance exists between judicial and administrative enforcement mechanisms. Both provide for EEOC enforcement; both contain initial administrative enforcement mechanisms (internal agency programs for federal employees; state agency or EEOC mechanisms for state and local government employees); the enforcement provisions of § 2000e-5 apply to each; and, in both situations, the complainant may ultimately file his own civil lawsuit in federal court, but only after exhausting the statute's administrative procedures. The differences between the two sections may be attributed to the greater degree of control Congress has over federal agencies as opposed to non-federal employers, rather than to any intent by Congress to treat federal employees differently from state and local government employees. *Compare* 42 U.S.C. § 2000e-16 *with* 42 U.S.C. § 2000e-5.

This Court's statement in *Brown* of its desire to prevent federal employee-plaintiffs from subverting the integrated and complete remedial scheme provided by Title VII reveals an intention consistent with that in *Sea Clammers* and *Smith v. Robinson* to restrict parties to precise and detailed statutory remedies when Congress has seen fit to provide such relief for specific wrongs. The similarity in structure between the remedial scheme in Title VII for federal employees and the scheme applicable to state and local government employees makes *Brown* directly applicable to this case.

Just as the Seventh Circuit distinguished *Brown* as a case involving federal employees, it dismissed *Novotny* as a case of private discrimination. *Trigg*, 766 F.2d at 301. Much of the reasoning of this Court in the *Novotny* opinion, however, also applies to this case.

In *Novotny*, this Court examined the general provisions in Title VII applicable to state and local government and private employees. The plaintiff, a discharged employee, attempted pursuant to 42 U.S.C. § 1985(3) to bring a claim for damages against his private employer. He claimed that he had been injured as a result of a conspiracy to deprive him of equal protection of and equal privileges and immunities under the laws. 442 U.S. at 369.

This Court held that, because Title VII comprehensively covered the subject matter of the plaintiff's claim, the Section 1985(3) claim could not be maintained. It stated that "[u]nder Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims." The Court then reasoned that, "[i]f a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law [and] completely

bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." 442 U.S. at 372-76.

The present case presents the same problem. Alexander's counts II and IV both allege actions which are violations of Title VII. By bringing those claims under Section 1983, however, Alexander has completely bypassed the entire carefully designed remedial scheme in Title VII. Alexander has thus brought about the same situation this Court decried in the *Novotny* opinion.

The statute at issue in *Novotny*, Section 1985(3), has much in common with Section 1983. The two statutes share a common origin in the Civil Rights Act of 1871, and the aim of both statutes was to combat the Ku Klux Klan and to provide a new federal remedy to enforce rights not adequately protected by the states. *See Allen* v. *McCurry*, 449 U.S. 90, 98-99 (1980) (discussion of Section 1983); *Monroe* v. *Pape*, 365 U.S. 167, 180-81 (1961) (discussion of Sections 1983 and 1985(3)). Moreover, both sections are merely remedial provisions which do not themselves create any rights. *Novotny*, 442 U.S. at 372; *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 617-18 (1979). There is thus no valid basis for any argument that *Novotny* is distinguishable from the present case because of differences between these two statutes.

The Seventh Circuit in *Trigg* focused on the point that *Novotny*, as a private employee, could not assert any constitutional violation against his employer. A state or local government employee, by contrast, can always make a constitutional claim simply because of who his employer is. *Trigg*, 766 F.2d at 301. This distinction, however, does not mandate that two completely inconsistent remedies be made available to state and local employees: one remedy for Title VII violations in which the plaintiff invokes the Constitution, and a different

remedy for Title VII violations where he does not. The Seventh Circuit offers no explanation why the carefully tailored scheme offered by Title VII cannot fully protect a plaintiff's rights in both situations.

The same problem this Court sought to eliminate in *Novotny* is also present in this case. In the Seventh Circuit's view, Alexander may sidestep the entire Title VII scheme and assert what are clearly Title VII claims directly in federal district court simply by designating his pleading as a Section 1983 claim. The balance, completeness and structural integrity of Title VII indicate that Congress did not intend such an incongruous result.

Older decisions of this Court concerning Title VII do not in any way compel the conclusion reached by the Seventh Circuit. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court held that 42 U.S.C. § 1981 ("Section 1981") remains available to remedy employment discrimination despite the later passage of Title VII. Section 1981 is fundamentally different from Section 1983, though. Unlike Section 1983, which merely provides a remedy and creates no right itself (*Chapman*, 441 U.S. at 617), Section 1981 creates an independent substantive right to contract ("All persons . . . shall have the same right in every State and Territory to make and enforce contracts . . ."). Further, unlike Section 1983 which requires state action, Section 1981 may be used against private entities (*e.g. Johnson*, 421 U.S. 454) and against the federal government (*Baker v. F&F Investment Co.*, 489 F.2d 829, 832-33 (7th Cir. 1973)). Given the important distinction between these two statutes, it is not inconsistent for Congress to intend that the Section 1981 remedy remains viable to redress violations of independent rights created by that statute while Section 1983, which merely provides a general remedy, is preempted in the specific area of employment discrimination by the more comprehensive remedies of Title VII.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that an employee had the right to seek relief under Title VII despite the fact that he had already submitted his claim to binding arbitration under a collective bargaining agreement. That case did not present any conflict between two acts of Congress as does the present case. Rather, that case involved both a contractual right and a statutory right. This Court held that "no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." 415 U.S. at 50. The present case, by contrast, presents a clear inconsistency between one statute which permits a plaintiff to proceed directly into court and another which requires the plaintiff to utilize other avenues of relief before utilizing the same federal forum. In cases such as the present one, plaintiffs are limited to Title VII, which protects all rights which could be violated by the actions alleged.

D. This Court's Most Controlling Authority Demonstrates The Error Of The Seventh Circuit's Decision

The leading decisions of this Court, viewed together, reveal the error of the Seventh Circuit's narrow view which would allow plaintiffs to choose whether to subvert the purpose of Title VII. *Sea Clammers* directs courts to evaluate the relationship between Section 1983 and more recently enacted, specific remedial statutes by first looking at the structure of the newer statute. The completeness of the remedies provided in the newer statute may in itself demonstrate Congress' intent not to preserve a pre-existing inconsistent remedy. In both *Brown v. GSA* and *Novotny*, this Court has already undertaken such an analysis of Title VII's structure, and in both cases the Court concluded that Title VII overrides the older, more general remedy. In *Brown*, the Court looked at Section 717 of Title VII; the elements the Court deemed important in that section's structure are also present in the general sections of Title VII

here at issue. In *Novotny*, the Court looked at the precise section of Title VII now under consideration and found the remedies provided therein to preempt the general remedy under Section 1985(3), a statute closely related to Section 1983. Perhaps most important is *Smith v. Robinson*, in which the Court established that the substance of the pleading is more important than the label a plaintiff affixes to it, holding that the mere pleading of a constitutional claim is not enough to avoid the scheme of a comprehensive remedial statute. The precise holdings and the broader persuasive reasoning of these cases demonstrate that the Seventh Circuit erred in reversing the dismissal of Alexander's counts II and IV.

II. THE SEVENTH CIRCUIT RULING PRODUCES AN UNFAIR AND ANOMALOUS RESULT

The Seventh Circuit's decisions in *Trigg* and in this case will yield unfortunate and anomalous consequences. As a result of these decisions, each state or local government employee-plaintiff is free to decide whether he will pursue his employment discrimination claim under Title VII, or whether he will circumvent the carefully constructed and detailed remedial scheme and proceed directly into federal court. All a plaintiff need do to bypass the entire EEOC mechanism is to allege that the employment discrimination complained of violates a right secured by the Constitution. On the other hand, a mere allegation of employment discrimination without using the magical constitutional words compels the plaintiff to exhaust the EEOC prerequisites before he is permitted to assert his claim in federal court. The Seventh Circuit's approach glorifies semantics over substance. What a plaintiff calls his claim becomes more important than what it actually is. That this result undercuts the very function of Title VII is obvious.

It also makes little sense that Congress would, in 1972, undertake to make Title VII expressly applicable to state and local government employees, if Section 1983 already gave

plaintiffs a more advantageous remedy for the same wrong by allowing them to go straight into court and obtain full relief. Title VII's 1972 amendment is understandable only when examined in light of this Court's directive in *Sea Clammers*. Congress' intent to preclude the remedy of suits under Section 1983 is made clear by the broad scope of the Title VII remedies which were ultimately enacted into law. Plaintiffs must adhere to the procedural steps prescribed in Title VII before proceeding into court. Where Title VII and Section 1983 confront one another, Section 1983 must be preempted.

Another inconsistency produced by the Seventh Circuit's approach is that state and local government employees are placed in a preferred status over all other employees. Under *Brown v. GSA*, federal employees clearly have no remedy to redress employment discrimination other than Title VII. Those who work for private employers also cannot assert employment discrimination claims under Section 1983. In its opinion in this case, the Seventh Circuit recognized this anomaly:

> "We sympathize with defendants' position and note that our holding and that of the Sixth Circuit create the anomalous situation that a federal employee is limited by the administrative procedures of Title VII while state employees are not. Because we interpret what remedies Congress has provided, we rule as we do. Congress may amend Title VII if it so chooses."

773 F.2d at 856; Appendix at 11a.

The Sixth Circuit holding referred to is in *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984). In *Day*, however, the plaintiff had merely sought to utilize Section 1983 to advance a claim that his state agency employer discriminated against him by retaliating against him for his filing of a charge with the EEOC. No constitutional claim was made. The Sixth Circuit held that "Title VII provides the

exclusive remedy when the only § 1983 cause of action is based on a violation of Title VII." 749 F.2d at 1204. It therefore affirmed the dismissal of plaintiff's Section 1983 claim.

In essence, the Sixth Circuit interpreted this Court's *Novotny* reasoning to include claims brought under Section 1983 as well as claims under Section 1985(3). In dictum, however, the Sixth Circuit went further and stated that where an employee can show that the employer's conduct violated both Title VII and rights from some other source such as the Constitution, the claim based on the other source is independent and may be redressed under Section 1983. 749 F.2d at 1205. It is far from clear, however, whether such an abstract proposition supports the Seventh Circuit's holding in this case or supports the position taken by the Park District in this petition.

Since even the Seventh Circuit recognizes the iniquity of its own decision, there is good reason for this Court to evaluate the statutes here involved. A closer examination will demonstrate that Congress did not dictate such uneven application of its laws.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ABOUT WHICH CONSIDERABLE CONFUSION EXISTS AMONG LOWER COURTS

As stated at the outset of this petition, this Court has never decided whether a Section 1983 remedy is available for a claim of employment discrimination which is cognizable under Title VII. Although this Court has decided several cases in which the relationship between some of the post-Civil War civil rights acts and various modern specific remedial schemes were at issue, there is still considerable confusion among lower courts on the way in which the present issue should be resolved. This case presents the Court with the opportunity to provide guidance to the courts by deciding this controversial question of federal law.

In its opinion in this case, the Seventh Circuit indicated its perception that its holding is supported by the Sixth Circuit decision of *Day v. Wayne County Board of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984). Appendix at 11a. The preceding section demonstrated that the Sixth Circuit's statement is only dictum and that the meaning of the Sixth Circuit's statement is also unclear. The Seventh Circuit's opinion in this case also refers to authority from the Fifth Circuit. Yet, none of the cited Fifth Circuit cases had decided the present issue. Moreover, those cases indicate that considertion of a Section 1983 remedy in the context of employment discrimination "is necessary only if [its] violation can be made out on grounds different from those *available under* Title VII." *E.g. Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982) (emphasis supplied). That language indicates, contrary to the Seventh Circuit's apparent reading, that the Park District's position may also find support in the Fifth Circuit.

District courts in other circuits, in cases decided after *Trigg*, have taken positions directly contrary to that of the Seventh Circuit on the precise issue presented here. In *Keller v. Prince George's County Department of Social Services*, 616 F.Supp. 540 (D. Md. 1985), the court held, citing *Sea Clammers*, *Smith v. Robinson*, *Brown v. GSA* and *Novotny*, that a state employee could not maintain a Section 1983 action for employment discrimination despite the fact that the employee alleged that the employer's action violated the equal protection guarantee of the Fourteenth Amendment. Even more significant is the recent opinion in *Reiter v. Center Consolidated School District No. 26-JT*, 618 F.Supp. 1458 (D. Colo. 1985). There the court cited both *Day v. Wayne County* and *Rivera v. City of Wichita Falls*, the same Sixth and Fifth Circuit decisions cited by the Seventh Circuit in this action, as support for its holding that the plaintiff could *not* assert claims of deprivation of freedom of speech, academic freedom and freedom of association under Section 1983 because those claims were based on alleged acts

prohibited by Title VII. The court held that those claims were therefore not independent of Title VII. *Reiter*, 618 F.Supp. at 1462-63.

The wide variation in the interpretation of the leading cases in this area of the law is especially troublesome given the frequency with which this issue is likely to arise. As an example, in the Seventh Circuit alone, the past year has produced at least eight reported decisions on this precise issue. The district courts in this case (N.D. Ill.), *Trigg* (N.D. Ind.), *Ratliff v. City of Milwaukee*, 608 F.Supp. 1109 (E.D. Wis. 1985), and *Torres v. Wisconsin Department of Health and Social Services*, 592 F.Supp. 922 (E.D. Wis. 1984) held, in cases which pre-dated *Trigg*, that Section 1983 was preempted. *Strama v. City of Chicago*, 617 F.Supp. 422 (N.D. Ill. 1985) (post-*Trigg*), *Meyett v. Coleman*, 613 F.Supp. 39 (W.D. Wis. 1985), *Storey v. Board of Regents*, 600 F.Supp. 838 (W.D. Wis. 1985) and *Zewde v. Elgin Community College*, 601 F.Supp. 1237 (N.D. Ill. 1984), all reached the opposite conclusion. As is evident from recent district court opinions such as *Keller* and *Reiter*, discussed above, it is unlikely that the Seventh Circuit's perfunctory treatment of the issue in *Trigg* will in any way resolve the debate on this question in the other circuits.

It is evident even from the limited discussion above that the lower courts as a whole are confused and in conflict on the present issue. The guidance of this Court is necessary to promote consistency among the courts on this recurring issue. As this Court is aware, Section 1983 suits have increased "geometrically" in recent years. *See Pulliam v. Allen*, ____ U.S. ____, 104 S.Ct. 1970, 1988 (1984) (Powell, J., dissenting). The lower courts are, for the most part, powerless to stem the tide of these cases. This Court has given indications, however, through decisions such as *Sea Clammers* and *Smith v. Robinson*, that one thing that lower courts must do is to limit

Section 1983 to situations where its application is proper. The district court in this case sought to do just that. It held that Section 1983 is not appropriately applied where it vitiates a fair and equitable remedial system which encourages settlement and conciliation. The Seventh Circuit was in error in reversing that holding.

IV. CONCLUSION

The Seventh Circuit's opinion in this case indicates that the court felt constrained to make an anomalous ruling because of its interpretation of Congress' intent with respect to Section 1983 and Title VII. 773 F.2d at 856; Appendix at 11a. The Seventh Circuit has stated in effect that Congress has spoken and that the courts are powerless to do anything about any unfairness that results. The court is only partially correct, however. Congress has spoken, but not by scattering suggestions in Title VII's voluminous legislative history. Rather, it has spoken through the statutes it has enacted into law. The specificity and detail of Title VII, the inconsistencies between Title VII's remedial scheme and the remedies available under Section 1983, and Title VII's "balance, completeness and structural integrity" (*see Brown v. GSA*, 425 U.S. at 832) all reveal Congress' intent on this issue. Congress chose Alexander's exclusive means for relief when it made Title VII available to state and local government employees without expressly preserving the inconsistent remedy previously provided by Section 1983.

Title VII must be read to preempt Section 1983 actions where the two statutes directly confront one another. Section 1983's remedies will thus be preserved for those situations where they are needed: to assert genuinely independent rights which do not arise out of the identical facts which would support a Title VII claim. Alexander's claims were improperly brought under Section 1983 and the Seventh Circuit erred in reversing their dismissal.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of

Appeals for the Seventh Circuit and, upon review, this Court should reverse the Seventh Circuit's holding with respect to counts II and IV of Alexander's fourth amended complaint.

Respectfully submitted,

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85-1342

No.

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO PARK DISTRICT, *et al.*,

Petitioners,

v.

SILAS J. ALEXANDER, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2995

SILAS J. ALEXANDER, et al.,

Plaintiffs-Appellants,

v.

CHICAGO PARK DISTRICT, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 2242—**George N. Leighton**, *Judge.*

ARGUED JUNE 4, 1985—DECIDED SEPTEMBER 19, 1985

Before CUMMINGS, *Chief Judge*, ESCHBACH, *Circuit Judge*, and WRIGHT, *Senior Circuit Judge.**

WRIGHT, *Senior Circuit Judge.* This lengthy litigation alleging discrimination in resources allocation and employment by the Chicago Park District during the years 1970 through 1980 raises these issues:

1) Did the court err in dismissing three counts of the amended complaint under res judicata and collateral estoppel?

2) Did it err in dismissing the remaining three counts of the amended complaint for failure to state a cause of action under 42 U.S.C. § 1983?

3) Did it err in denying plaintiffs' recusal motions?

* The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

FACTS

The procedural sequence in this case is convoluted and will be simplified here to include only pertinent facts.

In 1979, Alexander filed a class action on behalf of all Black, Hispanic and poor Chicago residents alleging racial discrimination by the Chicago Park District and its attorneys, superintendent and past and present commissioners (collectively District). Personal liability is sought against the individual defendants.

In 1982, we affirmed the court's denial of plaintiffs' motion for a preliminary injunction to restrain the budgetary and fund allocation actions of the District. *Alexander v. Chicago Park District*, 709 F.2d 463 (7th Cir. 1983). Plaintiffs then filed two unsuccessful motions to disqualify Judge Leighton and followed these with a mandamus petition which we denied on February 8, 1983. Alexander's petition for an en banc rehearing on this mandamus petition was denied on April 4, 1983.

In 1983, the district court denied plaintiffs' motion for class notification under FED. R. CIV. P. 23(c)(2). It determined that class members would not be prejudiced because if the defendants prevailed, the class members without notice would not be bound.

Later in 1983, the district court consolidated this case with another class action, *Midwest Community Council, Inc. v. Chicago Park District (Midwest)*, No. 79 C 3187 (N.D. Ill. Sept. 16, 1983) (unpublished), which raised similar discriminatory recreational resources allocation claims against the District. The *Midwest* action sought only equitable relief.

In count I of the second amended complaint, plaintiffs alleged that defendants administered the Chicago Park District in a racially discriminatory manner, so that parks located in predominantly Black communities were allocated less park resources, including state and federal funds, resulting in injuries and disparities in equipment and services. This count was brought under 42 U.S.C. § 1983.

Relying on the Due Process and Equal Protection clauses of the United States and Illinois Constitutions and on § 1983, plaintiffs brought employment discrimination claims in counts II and III. Count II charged that a civil service examination administered by the Park Service was not (1) job-related, (2) culturally, racially and sexually unbiased, and (3) objectively administered.

Count III dealt with hiring, assigning and promoting employees based on race and ethnicity. This count also alleged a variance in numbers of administrative, recreational, support and maintenance staff between parks in white and non-white communities. This in turn was alleged to have forced certain plaintiffs to resign from park employ because of limited job opportunities.

Count IV, brought under § 1983, alleges personal injuries to several plaintiffs resulting from these racially discriminatory practices. A fifth count was subsequently deleted.

The consolidated cases were tried in 1983. The court severed Alexander's employment discrimination and tort claims. During trial, Alexander filed a third amended complaint, similar to the second in the relevant allegations.

After a three-month trial, the jury returned a verdict for the defendants on the resources allocation claims and judgment was entered against plaintiffs on count I in the *Alexander* suit. Because the jury heard the *Midwest* claims in an advisory capacity only, the court subsequently entered judgment for the District, incorporating its own findings of fact and conclusions of law. No appeal was taken from the *Midwest* judgment.

Defendants moved for summary judgment contending that the jury verdict on count I was res judicata on all claims in counts II, III and IV. In an order dated September 23, 1983, the court granted summary judgment on count IV, reasoning that the underlying basis of the tort claim was discriminatory resources allocation causing

dangerous conditions in black neighborhood parks. The court granted a partial summary judgment on counts II and III to the extent that discrimination in resource allocation or administration would not be relitigated. It then dismissed counts II and III under FED. R. CIV. P. 54(b) to allow the parties to appeal.

Alexander did not appeal but filed an amended complaint as authorized in the September 23 order. Count I alleged that the District expended federal funds in a racially and ethnically discriminatory manner in violation of regulations of the Department of Housing and Urban Development and Department of Interior under 42 U.S.C. § 1983.

Count II sought an injunction, reinstatement, back pay and damages under Due Process and Equal Protection Clauses of the United States and Illinois Constitutions and under 42 U.S.C. § 1983. It challenged the civil service examination given by the District on November 1, 1977 for a physical instructor position.

Count III incorporated the allegations of count I that defendants allocated resources to the parks in a discriminatory manner and the allegations of count II concerning the civil service examination. It also was brought under 42 U.S.C. § 1983.

Count IV alleged that the District had a policy of allocating resources and employees on a discriminatory basis in violation of the Due Process and Equal Protection Clauses of the United States and Illinois Constitutions and 42 U.S.C. § 1983. It sought monetary relief for hiring, assignment and payment of personnel on a racially discriminatory basis.

Count V alleged that the District expended federal funds in a discriminatory manner and contrary to federal regulations, resulting in class members being forced to resign from the District's employ. Count VI alleged that the policy of expending federal funds in a discriminatory manner resulted in reduced maintenance, aid and in-

spections at minority parks, resulting in physical injuries to minority members.

The District moved to dismiss on the grounds of res judicata and that the complaint failed to state a claim under 42 U.S.C. § 1983. The court granted the motion on October 18, 1984, dismissing counts I, V and VI on res judicata grounds and counts II, III and IV for failure to state a claim.

ANALYSIS

Res Judicata

Res judicata is a doctrine of repose. "Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals." *Nevada v. United States*, 463 U.S. 110, 129 (1983), quoting *Southern Pacific Railroad v. United States*, 168 U.S. 1, 49 (1897). *See also Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 469 (7th Cir. 1982) (purpose is to reduce costs of litigation).

Under res judicata, or claim preclusion,[1] a prior judgment on the merits bars the same parties or their privies

[1] Preclusion occurs under two theories: issue preclusion and claim preclusion. Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit on the merits between the same parties or their privies. Plaintiffs' claims are merged in the judgment for plaintiff while judgment for defendant acts to bar any further claims by plaintiff against that defendant. It is usually referred to as res judicata, and that is how we use it. *See Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, ____ 104 S. Ct. 892, 894 n.1 (1984).

(Footnote continued on following page)

from relitigating all issues which were raised and decided or could have been raised in the prior action. *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981); *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). The doctrine applies in civil rights suits as well. *Lee*, 685 F.2d at 198-99; *Local 1006, A.F.S.C.M.E., AFL-CIO v. Wurf*, 558 F. Supp. 230, 233 (N.D. Ill. 1982). *See also Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, ____, 104 S. Ct. 892, 899 (1984) (state preclusion law applies in federal § 1983 suit brought subsequent to state suit).

In determining the preclusive effect on the six counts in the fourth amended complaint of the jury's verdict on count I and the summary judgment on count IV of the third amended complaint, the court analyzed the three threshold requirements of res judicata: (1) identity of parties; (2) identity of causes of action; and (3) a final judgment on the merits. *Lee*, 685 F.2d at 199. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983); *Local 1006*, 558 F. Supp. at 234.

1. **Identity of Parties**

The court found that named plaintiffs in the fourth amended complaint were named also in the third amended complaint and so concerned itself only with the last two requirements. Twenty-seven plaintiffs were named in the third amended complaint. They were named in the fourth amended complaint, with the addition of the Commite Latino. No allegations were made as to the membership of the Commite and no motion for intervention was made.

---

[1] *continued*

Issue preclusion prevents relitigation of a matter of fact or law that was previously litigated and decided. *See Jones v. City of Alton*, 757 F.2d 878, 879 n.1 (7th Cir. 1985). It is usually referred to as collateral estoppel.

The trial court dealt with both issue and claim preclusion. Because of our decision on claim preclusion, we need not reach the collateral estoppel issue.

See 3B J. Moore, J. Kennedy, *Moore's Federal Practice* ¶ 23.90[2] (2d ed. 1985). The court ignored it as not properly a party to this class action and we agree.

On appeal the plaintiffs argue that res judicata was inappropriate because the court refused to require notice to the class. This does not affect application of res judicata against the named plaintiffs. Any preclusive effect against potential class members not notified of the suit is not an issue before us. *See Teamster Local 282 Pension Trust Fund v. Angelos*, No. 84-2141, slip op. at 4 (7th Cir. May 13, 1985) (second court decides for itself preclusive effect of first litigation).

2. Identity of Causes of Action

The trial court held that counts I of the third and fourth amended complaints were identical. It found that counts V and VI were premised on the same facts, which is sufficient identity for res judicata purposes.

A cause of action consists of "a single core of operative facts" which give rise to a remedy. *Mandarino v. Pollard*, 718 F.2d 845, 849 (7th Cir. 1983) (operative facts were employment termination and surrounding circumstances), *cert. denied*, ____ U.S. ____, 105 S. Ct. 116 (1984); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230, 1234-35 (7th Cir. 1982) (essential fact underlying first and second suit was seniority), *cert. denied*, 460 U.S. 1070 (1983); *Lee*, 685 F.2d at 200 (cause of action consists of single core of operative facts).

Plaintiffs assert that they complain of violations of federal regulations in counts V and VI, charges not made in previous complaints. This argument is to no avail. The essential fact in count I of the third amended complaint was discriminatory fund disbursement. It is the essential fact underlying counts V and VI of the fourth amended complaint.

A mere change in the legal theory does not create a new cause of action. *Shadid v. Oklahoma City*, 494 F.2d

1267, 1268 (10th Cir. 1974). *See also Harper Plastics*, 657 F.2d at 945 ("An unsuccessful party may not . . . frustrate . . . res judicata by cloaking the same cause of action in the language of a theory untried in the previous litigation."). Extensive evidence regarding compliance with the regulations was presented at trial.

Plaintiffs argue also that the general jury verdict is insufficient to determine precisely what was found on each issue. This confuses res judicata and collateral estoppel.

They assert that they were precluded from presenting evidence on injuries and deaths at the parks. The injury evidence went only to the issue of damages, not liability.

Both of the preceding arguments can be characterized as a challenge to the opportunity to fully and fairly litigate these claims. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Lee*, 685 F.2d at 201. This argument cannot be sustained in view of the three-month jury trial. Plaintiffs had a full and fair opportunity to litigate the issue of fund allocations. *See Jones*, 757 F.2d at 884; *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441, 451-52 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2656 (1985).

3. **Finality**

The plaintiffs challenged finality on the grounds that the September 23 order was insufficient for rule 54(b) purposes. The district judge did not agree but found that, even if the order was not appealable, it had the requisite finality for res judicata purposes.

Rule 54(b) requires that if a court enters final judgment on fewer than all the claims it must make a determination that there is no just reason for delay and expressly order the entry of judgment. FED. R. CIV. P. 54(b). The September 23 order did not technically comply with Rule 54(b), but it was clear:

> In order to enable the parties to this cause to appeal or cross-appeal, and in conformance with Rule 54(b), Fed. R. Civ. P., counts II and III of the Third

> Amended Complaint are dismissed, subject to the right of plaintiffs to file a Fourth Amended Complaint . . . .

The plaintiffs argue that remarks made by the court at a post-judgment conference indicate that the judgment was not to be considered final. The remarks came upon entry of the order. Because it is clear, and because the parties were explicitly told that the court wanted guidance from an appellate decision, we are convinced that the parties knew of their right to appeal.

The court did say it would certify under 28 U.S.C. § 1292(b) the res judicata effect of the count I verdict on counts II, III and IV. Even though no 28 U.S.C. § 1292(b) certification was entered, this did not make less clear the September 23 order.

Finally, while not expressly determining there was no just reason for delay in the order itself, the judge did determine that an appeal would be in the interest of the public, the court and the plaintiffs. This litigation had been before Judge Leighton for four and one-half years.

Although reluctant to deviate from the strict Rule 54(b) requirements, we have held that less than technical compliance will suffice when neither party is prejudiced by the lack of formality. *Local P-171, Amalgamated Meat Cutters & Butchers v. Thompson Farms Co.*, 642 F.2d 1065, 1072-73 (7th Cir. 1981); *accord Equal Employment Opportunity Comm'n v. Delta Air Lines, Inc.*, 578 F.2d 115, 116 (5th Cir. 1978). Plaintiffs' prejudice, if any, stems from their choice not to appeal the September 23 order and not from lack of sufficient notice that the order was appealable.

Plaintiffs also challenge the dismissal of count IV of their third amended complaint on res judicata grounds. This issue was appealable as of September 23, 1983. We note that the district court correctly determined this issue.

The district court was also correct that the September 23 order was sufficiently final for res judicata purposes even if not appealable. *Lummas Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962), held that judgments not final for § 1291 can be " 'final' in the sense of precluding further litigation [depending on] such factors as the nature of the decision, . . . the adequacy of the hearing and the opportunity for review." *Accord O'Reilly v. Malon*, 747 F.2d 820, 822-23 (1st Cir. 1984); *Commodity Futures Trading Comm'n v. Board of Trade of City of Chicago*, 701 F.2d 653, 657 (7th Cir. 1983); *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1191 (5th Cir. 1982), *rev'd on other grounds*, 460 U.S. 1007 (1983).

There is no doubt that two of the three *Lummas Co.* factors have been met here. The jury rendered a verdict only after a protracted trial. *See also Aiello v. City of Wilmington*, 470 F. Supp. 414, 419 (D.Del. 1979), *aff'd*, 623 F.2d 845 (3d Cir. 1980) (jury verdict final "in the sense of inalterable" from the date entered).

Title VII and § 1983

The district court dismissed the remaining counts of the Alexander plaintiffs' complaint on the grounds that Title VII is the exclusive remedy for employment discrimination charges. Under the principle established in *Trigg v. Fort Wayne Community Schools*, No. 84-1942 (7th Cir. June 25, 1985), we reverse.

Title VII is not the sole remedy for employment discrimination claims of state employees. *Id.*, slip op. at 5-6. Congress intended to retain preexisting remedies. Only if the right asserted was created by Title VII must it be vindicated through the procedural system set up in that Act. *Accord Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984). *See also Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 612 n.1 (5th Cir. 1983) (Title VII is remedy unless specific allegations of constitutional violations); *Rivera v. City of Wichita Falls*,

665 F.2d 531, 534 n.4 (5th Cir. 1982) (when § 1983 used as alternate remedy to Title VII, elements of cause of action are the same); *Whiting v. Jackson State University*, 616 F.2d 116, 121 (5th Cir. 1980) (same).

We sympathize with defendants' position and note that our holding and that of the Sixth Circuit create the anomolous situation that a federal employee is limited by the administrative procedures of Title VII while state employees are not. Because we interpret what remedies Congress has provided, we rule as we do. Congress may amend Title VII if it so chooses.

Counts II and IV are based on the Fourteenth Amendment's protection against intentional discrimination based on class membership. *Trigg*, slip op. at 2; *Huebschen v. Department of Health and Social Services*, 716 F.2d 1167, 1171 (7th Cir. 1983). They survive at this stage of the proceedings.

Count III is more problematic. Plaintiffs concede it is based on statutory violations. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). To the extent that it also alleges discriminatory fund disbursement, the district court has correctly ruled that the issue is already decided and may not be relitigated. That court will carefully limit the evidence to assure that defendant will not again be subjected to defending those allegations.

Recusal

On November 12, 1982, plaintiffs filed disqualification motions against Judge Leighton under 28 U.S.C. §§ 144 and 455(a). The motions were based on statements by the court during the hearing on plaintiffs' motion for a preliminary injunction and findings and conclusions entered in ruling on that motion.

Again we rule against plaintiffs on this issue. Under section 144, bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the

case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966); *United States v. English*, 501 F.2d 1254, 1263 (7th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975). The plaintiffs' affidavits set forth only rumor concerning the administration of the Chicago NAACP 25 years ago.

Plaintiffs' insinuations that the trial judge did not vigorously pursue alleged discrimination when he represented the NAACP are not an extrajudicial source of bias. What must stem from an extrajudicial source are facts and information.

Judge Leighton called as a witness Mr. Jones, a former President of the Chicago NAACP whom he had represented 25 years earlier. He indicated surprise that the plaintiffs had not called Jones or deposed him.

Contrary to plaintiffs' assertions, Jones' credibility was not automatically enhanced. The judge specified in denying the recusal motion that he had not prejudged Jones' testimony. *Cf. Roberts v. Bailar*, 625 F.2d 125, 127-29 (6th Cir. 1980).

Section 455(a) requires recusal if the judge's impartiality might reasonably be questioned. 28 U.S.C § 455(a); *Pepsico, Inc. v. McMillen*, No. 85-1932, slip op. at 3-4 (7th Cir. June 6, 1985). The association between Judge Leighton and Mr. Jones in 1958 was ancient history and insufficient to support a recusal motion.

CONCLUSION

We affirm the dismissal of counts I, V, and VI on res judicata grounds. We remand counts II, III and IV to the district court to rule first on the several other grounds raised in the District's summary judgment motion.

Judge Leighton has dealt with this complicated case in an admirable fashion. We affirm his dismissal of plaintiffs' recusal motions.

This case has been in the court system since June 27, 1979. In the interests of bringing it to an end and decreasing the costs to the parties and the courts, we retain jurisdiction during this remand. After final orders are entered below, this case will be resubmitted to this court and panel without oral argument. Leave will be granted to file briefs within three weeks after the record is certified to us. *See Grano v. Department of Development of City of Columbus*, 637 F.2d 1073, 1082 (6th Cir. 1980).

AFFIRMED IN PART AND REVERSED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—9-19-85—450

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 13, 1985.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*

Hon. JESSE E. ESCHBACH, *Circuit Judge*

Hon. EUGENE A. WRIGHT, *Senior Circuit Judge**

SILAS J. ALEXANDER, et al.,
Plaintiffs-Appellants,

No. 84-2995 vs.

CHICAGO PARK DISTRICT, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79-C-2242
George N. Leighton, Judge.

ORDER

On consideration of the petition for rehearing of defendants-appellees and the response thereto of plaintiffs-appellants, our slip opinion of September 19, 1985, is hereby corrected in the following two respects:

On page 11 of the slip opinion, the paragraph beginning "Count III is more problematic * * *" is replaced with the following four paragraphs:

> "Count III is more problematic. Plaintiffs concede that it is based on statutory violations. Generally, where a statute provides its own comprehensive enforcement

* The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

scheme, that scheme may not be bypassed by pleading an underlying violation of the statute and bringing suit directly under § 1983. *Middlesex County Sewerage Authority v. National* Sea Clammers Association, 453 U.S. 1, 20 (1981) (Federal Water Pollution Control Act, Marine Protection, Research and Sanctuaries Act); *Smith v. Robinson*, 104 S.Ct. 3457, 3468 (1984) (Education of the Handicapped Act); *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (habeas corpus).

"Title VII is one of the statutes that may not be bypassed. *Grand American Federal Savings v. Novotny*, 442 U.S. 366, 375-378 (1979) (Title VII may not be bypassed via § 1985(3)). Is Title VI like Title VII in this respect?

"We think it is. Title VI provides its own administrative enforcement procedure which would be bypassed by pleading Title VI violations under § 1983. Moreover, the remedies available under Title VI should in some cases be limited to declaratory and injunctive relief. *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 597-598 (1983). This limitation would be lost in the broad grant of a remedy at law or equity available under § 1983.

"Since Title VI provides its own remedial scheme, we hold that private actions based on Title VI may not be brought under § 1983. See *Guardians Association*, 463 U.S. at 610 n.3 (Powell, J., concurring)."

On page 12 of the slip opinion, the paragraph beginning "We affirm the dismissal * * *" is replaced with the following paragraph:

"We affirm the dismissal of counts I, V and VI on res judicata grounds. We affirm the dismissal of count III for failure to state a claim. We remand counts II and IV to the district court to rule first on the several other grounds raised in the District's summary judgment motion."

The petition for rehearing is hereby denied.

UNITED STATES DISTRICT COURT.
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No.: 79 C 2242 Date: Oct. 18, 1984

Title of Cause: Silas Alexander, et al. v. Chicago Park District, et al.

Brief Statement of Motion: Order ruling on defendants' motion to dismiss plaintiffs' Fourth Amended Complaint.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (seperate lists may be appended).

Names and Addresses of moving counsel: _____

_____

Representing: _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent.

_____

_____

Reserve space below for notations by minute clerk

The cause is before the court on defendants' motion to dismiss plaintiffs' Fourth Amended Complaint. For the reasons stated in the court's Memorandum, filed herewith, the motion is granted and this suit is dismissed in its entirety.

/s/ Leighton, *J.*

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

SILAS J. ALEXANDER, et al.
Plaintiffs,

v.

CHICAGO PARK DISTRICT, et al.,
Defendants.

No. 79 C 2242

Before the Honorable
George N. Leighton
United States District Judge

Memorandum

The cause is before the court on defendants' motion to dismiss plaintiffs' Fourth Amended complaint. For the following reasons, the motion is granted.

I

The suit in this case is a class action arising out of the alleged activities and practices of the Chicago Park District, during the years 1970 through 1980. Its origin can be traced from to June 1, 1979 when the original complaint, brought pursuant to 42 U.S.C. §§ 1983 and 1988, was filed by Dorotho Ware as sole plaintiff: But before defendants had answered, the complaint was amended with 35 Negroes and Hispanics as the named plaintiffs suing on behalf of themselves and "all individual black, Latino or poor residents of the City of Chicago."[1] Defendants were the Chicago Park District, nine former and present Commissioners, and its General Superintendent. The

[1] This class was later certified. The court, however, denied plaintiffs motion to send notices to the class members, it being determined that notice was only necessary in this type of class suit if, and only if, plaintiffs were successful on the merits.

amended complaint contained seven counts, however; for reasons not pertinent here, the court dismissed two of the counts. Thereafter, plaintiffs filed a second amended complaint containing five counts.

In Count I, they asserted claims under 42 U.S.C. §§ 1983 and 2000a, *et seq.*[2] They alleged that defendants, through their administration of the Chicago Park District system, had engaged in the practice of race discrimination in the allocation of resources so that parks located in communities largely populated by Negroes were denied park resources, including state and federal funds, in a manner that resulted in racial disparities, to the injury of plaintiffs and members of the class.

In Counts II and III, plaintiffs, relying on the due process and equal protection clauses of the United States and Illinois Constitutions, and on 42 U.S.C. § 1983, asserted claims for employment discrimination. In Count II plaintiffs, made reference to a "civil service examination" administered by the Park District and alleged that the examination was not "reasonably job-related, not reasonably free of cultural, racial and sexual bias and administered under such circumstances as not to assure objectivity, impartiality, accuracy or consistency . . . ."

In Count III, plaintiffs alleged that defendants

> developed and maintained a policy, practice, custom and usage of hiring, assigning and promoting Park District employees on the basis of race and ethnic background in that, in part, the Park District perpetuated "white" parks and facilities in white communities, to which white employees were assigned in disproportionately high numbers.

It was alleged that defendants had developed and maintained

> "a policy of establishing and perpetuating 'black' and 'Latino' parks and facilities . . . to which blacks are as-

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[2] On plaintiffs' motion, the court dismissed their claims brought under 42 U.S.C. § 2000(a).

> signed either exclusively or in disproportionately higher numbers. Conversely, blacks and Latinos are routinely, as a matter of policy, practice, custom and usage, denied the opportunity to transfer, be assigned to or be promoted into jobs located in white parks in white communities.

Plaintiffs stated that as a result of this policy, the assignment of administrative, recreational, support and maintenance staff varied substantially from park to park with a high correlation between greater allocation of these resources and predominently white communities, and a similarly high correlation between lower numbers and quality of staff assigned and predominently black and Latino communities. Plaintiffs alleged that as a result, "facilities serving minority communities have substantially fewer experienced staff and personnel of all types than do facilities serving predominently white communities," therefore, plaintiffs

> and others similarly situated, have been forced to resign from the employ of the park district, due to their realization that their opportunities for reassignment, higher pay and promotions were severely limited by reason of defendants' limiting blacks and Latinos to employment, assignment, pay and promotions within the context of black parks.

In Count IV, brought pursuant to 42 U.S.C. § 1983, plaintiffs alleged that as a proximate result of defendants' policy of allocating funds to the parks in a racially and ethnically discriminatory manner, the parks in minority communities were maintained in a dangerous and hazardous condition "with the result that injuries such as those sustained by plaintiffs are frequently sustained by blacks and Latinos who use the said parks and facilities." Reference was made in Count IV to an injury sustained by a minor plaintiff at a pool operated by the Chicago Park District.[3]

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[3] Count V of the Second Amended complaint, for reasons not pertinent here, was dismissed prior to trial.

At about the same time this case was begun a similar one, *Midwest Community Council, et al. v. Chicago Park District, et al.*, 79 C 3187, was filed by a different group of plaintiffs. It also was a class action suit brought on behalf of Negro residents of certain wards of the City of Chicago. The complaint alleged that the Chicago Park District had "purposefully discriminated against Black citizens on the basis of race in the allocation of recreational resources within the City of Chicago." Because of the similarities between the *Alexander* and *Midwest* cases, an order, pursuant to Rule 42, Fed.R.Civ.P., was entered consolidating them for trial. The court also entered an order providing that while the jury's verdict in the *Alexander* case would be mandatory, the verdict in the *Midwest* case would be advisory. After completion of discovery and disposition of pretrial matters, the cases proceeded to trial.

During the early part of the trial, the court granted *Midwest* plaintiffs' motion to sever Counts II, III and IV of the *Alexander* complaint. Accordingly, trial was had as to the *Midwest* case and Count I of *Alexander*, the count which alleged racial discrimination in the allocation of resources. Before the close of trial, the court granted the *Alexander* plaintiffs' motion to file a third amended complaint to conform to the evidence adduced at trial. The Third Amended Complaint was substantially identical to the Second. After thirty-seven days of hearing evidence over a period of nearly three months and deliberations over a period of five days, the jury returned verdicts in favor of all defendants and against each plaintiff in both cases. The court entered judgment, pursuant to Rule 58, Fed.R.Civ.P., on the verdicts in *Alexander* Shortly thereafter, it made its findings of fact, reached conclusions of law in *Midwest*, and in accordance with the jury's advisory verdict, enterted judgment in favor of all defendants and against all plaintiffs.

Following trial, defendants filed a motion, pursuant to Rule 56, Fed.R.Civ.P., seeking to have summary judgment

entered in their favor on Counts II, III and IV of plaintiffs' Third Amended Complaint, the counts that had not been tried. Defendants contended that the jury's verdict in favor of all defendants and against all plaintiffs in Count I was *res judicata* of all the claims raised in Counts II, III and IV. The court, on September 23, 1984, granted the motion with respect to Count IV, reasoning that:

> the legal basis of plaintiffs' claim under [Count IV] . . ., is that the defendants so administered the Chicago Park District system that the conditions in the parks used predominently by Negroes, Hispanics and poor people became dangerous, causing personal injury to plaintiffs... . The issue whether defendants, during the period in question, administered the Chicago Park District system in a racially discriminatory manner in the allocation of park resources was adjudicated against the plaintiffs by the jury's verdict in favor of all defendants. . . . For this reason, plaintiffs cannot again litigate with defendants the issue of race discrimination in the allocation of park resources within the Chicago Park District system.

The motion, however, was denied with respect to Counts II and III. In so ruling, the court determined that the jury's verdict in Count I was not *res judicata* of the issues raised by the allegations contained in Counts II and III, noting that

> there are material issues of fact to be resolved raised by the allegations of [those counts] and the answers thereto of defendants. Count I, which has been tried, alleged that the Chicago Park District, a municipal corporation, its General Superintendent, and its Commissioners, operated the park system in a manner that discriminated against Negroes, Hispanics, and poor residents of the City of Chicago on the basis of race in the allocation of park resources. Counts II and III . . . allege that the same defendants have denied the plaintiffs named in those counts employment opportunities because of their race, nationality, and the fact that they are poor residents of the City of Chicago.

Counts II and III raised issues distinct from the issue tried in Count I, therefore, defendants were not entitled to summary judgment as a matter of law as to those counts.

Although the motion was denied as to the two counts, an alternative motion for partial summary judgment was granted only to the extent that when Counts II and III are tried,

> plaintiffs will not be permitted, in opening statement, in presentation of evidence, in arguments to the jury, or in instructions to be requested, to either directly or indirectly relitigate with defendants the issue of whether in the administration of the Chicago Park District system, [defendants], discriminated against Negroes, Hispanics and poor people in the allocation of park resources which included finances, facilities, programs, and maintenance.

Finally, the order of September 23, 1984 provided, pursuant to Rule 54(b), Fed.Civ.P., that the judgment with respect to Count I and the summary judgment entered as to Count IV were to be final and, therefore, appealable. The effect of this order, as made clear from the bench (*see e.g.*, Transcript of Proceedings, September 23, 1984 at 7) was to make all orders entered in this case appealable and, depending on how the Court of Appeals ruled, trial of Counts II and III would be affected. To further enable the parties to appeal or cross appeal, Counts II and III were dismissed subject to the right of plaintiffs to file a Fourth Amended Complaint either thirty days from the date of the order or thirty days after the mandate of the Court of Appeals.

Instead of appealing, plaintiffs filed their Fourth Amended Complaint, which is the subject of the present motion to dismiss. The complaint contains six counts. Count I alleges that defendants expended federal financial assistance in a racially and ethnically discriminatory manner in violation of the regulations of the Department of Housing and Urban Development and Interior; in addition or in the alternative, claims are asserted under 42 U.S.C. § 1983.

Counts II, III IV and V, are employment discrimination claims. Count II is in equity for employment discrimination seeking injunctive relief, reinstatement, back pay and damages under the Due Process and Equal Protection Clauses of the United States and Illinois Constitutions, and under 42 U.S.C. § 1983. In this count, plaintiffs, making reference to a civil service examniation administered by defendants, allege that the examination was not reasonably job-related, free of cultural, racial and sexual bias; and that it was not administered under circumstances that assured objectivity, impartiality, accuracy or consistency. This count is substantially identical to Count II of the previous complaint.

Count III is entitled "Employment Discrimination Violative of Departmental Funding Regulations, for which Section 1983 Relief Sought." In this count, plaintiffs incorporate the allegations of Count I which allege that defendants allocated resources to the parks in a racially discriminatory manner and incorporates the allegations in Count II concerning the administration of the civil service examination. Count III seeks the same relief as Count II.

Count IV is brought under the Due Process and Equal Protection Clauses of the United States and Illinois Constitutions, and under 42 U.S.C. § 1983. It alleges that defendants have

> developed and maintained a policy, practice, custom and usage of hiring, assigning and promoting its employees on the basis of race and ethnic background in that, in part, the PARK DISTRICT has perpetuated "white" parks and facilities in white communities, to which white employees are assigned in disproportionately high numbers, and, in part, by excluding blacks and persons of Latino descent from the upper administrative positions in the Park District.

It is then alleged that defendants have a policy of allocating resources to the parks on a racially discriminatory basis, with a

high correlation between allocation of funds and predominently white communities; and that as a result of this policy:

> the assignment of administrative, recreational, support and maintenance staff varies substantially from park to park with a high correlation between greater numbers and higher quality or personnel assigned and predominance of whites in communities served and a similarily high correlation between lower numbers and lower quality of staff assigned and predominence of blacks and persons of Latino descent in the communities served... .
>
> The fact that significantly less funds are allocated to black and Latino parks, and substantially fewer staff assigned to them than to white parks, combined with the policy, custom and practice of defendants of hiring, assigning and paying personnel on a racially and ethnically discriminatory basis, produces the result that black and Latino employees are forced to compete against others for fewer jobs commanding less funds than those available to their white counterparts, which fact has caused defendants to devise such expedients as the "civil service examination" described in Counts II and III hereto for the purpose of reducing the number of the DISTRICT's black and Latino employees... .
>
> As a further result of defendants' aforesaid policy, practice, custom and usae[sic], plaintiffs . . . have been forced to resign from the employ of the PARK DISTRICT, due to their realization that their opportunities for reassignment, higher pay and promotions were severely limited by reason of defendants limiting blacks and Latinos to employment, assignment, pay and promotions within the context of black and Latino parks, or have been wrongfully terminated.

In Count V it is alleged that, contrary to the federal regulations as alleged in Count I, defendants expended federal financial assistance in a racially and ethically discriminatory manner, with the result that certain named plaintiffs and others

similarly situated have been forced to resign from the employ of the Park District,

> due to their realization that their opportunities for reassignment, higher pay, and promotions were severely limited by reason of defendants' limiting blacks and Latinos to employment, assignment, pay and promotions within the context of black and Latino parks, or have been wrongfully terminated.

Finally, in Count VI, plaintiffs again allege that defendants had a policy of expending federal financial assistance in a racially and ethnically discriminatory manner, such that parks in black and Latino communities received substantially less maintenance, staff aid and safety inspections and reviews than parks located in white neighborhoods. As a result,

> substantial hazardous conditions are created and continue to exist in parks located in neighborhoods which serve primarily black, Latino and poor neighborhoods with resultant personal injuries to minority park patrons.

It is then alleged that the

> personal injuries sustained by plaintiffs and others similarly situated were the direct and proximate result of the racially ethnically discriminatory policies of defendants whereby parks and facilities operated by defendants in black, Latino and poor neighborhoods are deliberately poorly maintained, staffed, funded, thereby causing dangerous conditions to exist . . . .

Plaintiffs seek to recover actual and punitive damages.

Defendants have moved to dismiss the entire Fourth Amended Complaint on grounds, among others, of *res judicata* and that the complaint fails to state a claim under 42 U.S.C. § 1983.[4] It is defendants' contention that the jury's verdict on

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[4] Defendants, raise numerous other grounds for dismissal of the Fourth Amended complaint. Because the court con-

(Footnote continued on following page.)

Count I of the Third Amended Complaint, and the summary judgment granted as to Count IV of that complaint, effectively precludes litigation of the entire litany of issues presented in plaintiffs' Fourth Amended Complaint. They also contend that plaintiffs cannot rely on 42 U.S.C. § 1983 to bring what are in effect employment discrimination claims.

II

Under *res judicata*, or claim preclusion, a prior judgment will bar an identical claim or cause of action from being relitigated. *Harper Plastic, Corp. v. Amoco Chemical Corp.*, 657 F.2d 939, 945 (7th Cir. 1981). The doctrine also operates to bar all claims or causes of action which could have been asserted by the parties in the earlier case. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1949); *Morris v. Jones*, 329 U.S. 545, 552 (1947). It is a doctrine "founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and contested issues decided against him, he may not later renew the litigation." MOORES FEDERAL PRACTICE, ¶ 405 [1], pp. 186-87. The Supreme Court has observed that *res judicata* "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy by preventing needless litigation." *Parkline Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

The pivotal question presented in this motion is what effect, if any, does the jury's verdict on Count I of the Third Amended Complaint, and the summary judgment entered as to

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(Footnote continued from preceding page.)

cludes that the reasons discussed in this memorandum are dispositive of the motion, it will not address the other grounds for dismissal raised in defendants' motion.

Count IV of that complaint, have on each of the six counts of the Fourth Amended Complaint. In order for these judgments to have a preclusive effect, three threshold requirements must be met: (1) there must be an identity of parties; (2) there must be an indentity of causes of action; and (3) there must be a final judgment on the merits. *Local 1006, American Federation of State, County and Municipal Employees v. Wurf*, 558 F. Supp. 230, 234 (N.D.Ill. 1982). There is no dispute that the parties to this action are the same in both the Third and Fourth Amended Complaints; therefore, the court need only concern itself with the last two requirments.

Clearly Count I of the Fourth Amended Complaint, the allocation of resouces count, is the same cause of action as was previously tried. The fact that these counts seek relief under different federal statutes and regulations does not indicate that they are different causes of action. "The primary test for determining if two suits are premised on the same causes of action is whether both suits arise out of the same basic factual situations." *Himel v. Continental National Bank & Trust Company*, 596 F.2d 205, 209 (7th Cir. 1979). A mere change in the legal theory under which a plaintiff seeks relief does not create a new cause of action. *Shadid v. Oklahoma City*, 494 F.2d 1267, 1268 (10th Cir. 1974). Both counts arise from the same factual setting, namely the manner in which defendants allocated resources to the parks; therefore, these counts are the same causes of action.

In Counts V and VI[5], it is clear that the factual predicate for these claims lies in the allegation that defendants expended

[5] Counts II, III and IV are seperate causes of action. A careful review of these counts disclose that they contain allegations of employment discrimination which are not factually predicated on defendants' alleged policy of allocating resources to the parks in a racially discriminatory manner. Different facts and evidence than produced in the previous trial would be needed to sustain these claims.

federal funds to the parks in a racially discriminatory manner. Because they are premised on the same allegation as was tried, Counts V and VI are the same causes of action as Count I of the Third Amended Complaint.

It is plaintiffs' contention that the claim for employment discrimination contained in Count V and the personal injury claims in Count VI should not be barred because these are not the same causes of action as the racial discrimination in the allocation of resources claim. The court disagrees. As the Seventh Circuit has noted in discussing what constitutes a cause of action for *res judicata* purposes:

> A cause of action consists of a single core of operative facts, which give the plaintiff a right to seek redress for the wrong concerned. Even though one group of facts may give rise to different claims for relief, upon different theories of recovery, there remains a single cause of action. If the same facts are essential to the maintenance of both proceedings, or the same evidence is needed to sustain both, then there is identity between the allegedy different causes of action asserted, and *res judicata* bars the latter action.

Lee v. City of Peoria, 685 F.2d 196, 200 (7th Cir. 1982).

The same facts are essential and the same evidence is needed to sustain both the racial discrimination in the allocation of resources claim of Count I of the Third Amended Complaint and Counts V and VI of the Fourth Amended Complaint. For example, in Count VI plaintiffs allege that the "injuries sustained by [them] were the direct and proximate result of the racially and ethnically discriminatory policies of defendants" in allocating resources to the parks. Because plaintiffs, by there own allegations, must first prove that defendants allocated resources in a discriminatory manner in order to show that defendants' actions were the direct and proximate cause of plaintiffs' injuries, the same facts and evidence as produced in Count I of the Third Amended

Complaint are needed to sustain the personal injury count. Similarily, in Count V, as pled by plaintiffs, the employment discrimination alleged is the result of defendants' policy of allocating resources to the parks in a discrimnatory manner. Therefore, "there is identity between the allegedly different causes of action asserted, and *res judicata* bars [litigation of Counts V and VI.]" *Lee v. City of Peoria, supra.*

Plaintiffs also contend that *res judicata* does not apply to the Fourth Amended Complaint because the judgments entered were not "final." It is the plaintiffs' position that the court's certification of the judgment was contingent on plaintiffs' right to appeal. There being no appeal, they argue, there can be no final judgment and hence no application of *res judicata.* Plaintiffs also point out that the certification under Rule 54 was not proper because the court never made an express determination that "there is no just reason for delay" as required by the rule. Thus, they contend, the judgments remain interlocutory and have no preclusive effects.

Although the court does not agree with plaintiffs' interpretation of the order or that the Rule 54 certification was inadequate to make the judgments appealable; *assuming arguendo,* that plaintiff is correct, the judgments still would have the requisite "finality" needed to to give them a preclusive effect on the Fourth Amended Complaint. As a general rule, principles of *res judicata* and collateral estoppel do not pertain to non-final orders and judgments. WRIGHT, MILLIER & COPPER, 18 Federal Practice and Procedure: Jurisdiction § 4432. Under some circumstance, however, "an interlocutory order may be final for *res judicata* purposes if 'in respect to some particular it makes a final disposition, in which case it is *res judicata* as to that one matter.' " *Aiello v. City of Wilmington,* 470 F. Supp. 414, 419 (D.Del. 1979). At least two courts of appeals have held that finality for *res judicata* purposes is not co-extensive with the finality needed to perfect an appeal:

> Whether a judgment, not "final" in the sense of 28 U.S.C. § 1291, ought nevertheless be considered "final" in the sense of precluding further litigation of the same issues, turns upon such factors as the nature of the decision (i.e. that it was not avowedly tentative), the adequacy of the hearing and the opportunity for review. "Finality" in the context here relevant may mean little more than the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); *accord*, *Pye v. Department of Transportation*, 513 F.2d 290, 292 (5th Cir. 1975). Applying this flexible approach, it is clear that the judgment rendered on Counts I and IV of the Third Amended Complaint have the "finality" needed to give them preclusive effect. There is no reason whatsoever to permit plaintiffs to relitigate these claims. There was an extensive trial had, encompassing thirty-seven days of hearing evidence over a three-month period, with a jury deliberating over a five-day period and entering a verdict against plaintiffs. They were given a fair and adequate opportunity to litigate their claim. The jury's verdict as to Count I of the Third Amended Complaint and the summary judgment entered on Count IV of that complaint have to be considered "final" for the purposes of precluding Counts I, V and VI of the Fourth Amended Complaint. Therefore; even if plaintiffs are correct that the judgments are not appealable, the court concludes that they "fall into the limited category of non-appealable orders that may be deemed final for *res judicata* purposes." *Aiello v. City of Wilmington*, 470 F. Supp. at 420. Accordingly, Counts I, V and VI of the Fourth Amended Complaint are barred by res judicata.

III

Defendants next contend that if any counts of the Fourth Amended Complaint are not barred by *res judicata* then they must be dismissed on other grounds. They vehemently argue that plaintiffs cannot bring an action under Section 1983 against these state officials for employment discrimination. It is their position that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides the exclusive remedy for employment discrimination and plaintiffs cannot side-step the detailed and comprehensive administrative and judicial schemes of Title VII by filing what is essentially a Title VII action under the heading of Section 1983. They contend, citing *Great American Federal Savings and Loan Association v. Novotony*, 442 U.S. 336 (1979), that Title VII effectivly displaces other causes of action, such as Section 1983 and 1985(3), and is the exclusive remedy for violations of substanative rights in the context of employment discrimination. In *Novotony*, the Court held that a "deprivation of a right created by Title VII cannot be a basis for a cause of action under Section 1985(3)." *Id.* at 378.

While defendants admit that the Supreme Court has yet to pass on the question presented here, of the viability of a Section 1983 action to redress employment discrimination claims against state officials, they direct the court's attention to *Brown v. General Services Administration*, 425 U.S. 820 (1976), where it was held that the exclusive remedy for employment discrimination by federal employees is Title VII. In reaching this conclusions, the Court found that both the legislative history and statutory composition of Title VII envinced a congressional intent that it be the exclusive, preemptive administrative and judicial scheme for redress of employment discrimination by federal employees. While *Brown* only applied to cases of employment discrimination by federal officials, and Section 1983 does not apply to actions by federal officials, defendants urge the court to adopt the rationale of *Brown*, arguing no distinction should be made between actions by federal and state

officials. They insist that to allow a suit against state officials for employment discrimination under Section 1983 would permit a plaintiff to eliminate the detailed administrative scheme of Title VII "by the simple expedient of putting a different label on [the] pleadings." *Brown v. Government Services Administration, supra* at 833, *quoting Preiser v. Rodriquez*, 411 U.S. 475, 489-90 (1973).

Similarly, defendants cite *Middlesex County Sewerage Authority v. Sea Clammers*, 453 U.S. 1 (1980), where the Court concluded that the comprehensive and detailed schemes contained in certain federal environmental laws preclude an action under Section 1983:

> When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate a congressional intent to preclude the remedy of suits under § 1983. As Justice Stewart, who later joined the majority in *Maine v. Thiboutot*, stated in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 673, n.2 (1979) (dissenting opinion), when "a state official is alleged to have violated a stautue which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983." .... We therefore conclude that the existance of these express remedies [in the federal environmental laws in issue] demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983.

Middlesex County Sewerage Authority v. Sea Clammers, 453 U.S. 1, 20-21 (1980). The result of *Novotny*, *Brown*, and *Sea Clammers*, defendants maintain, and this court agrees, is that Title VII with its exhaustive system for remedying employment discrimination is an exclusive remedy.

When the parties briefed this question they were unaided by the recent decision of Judge Warren of the Eastern District

of Wisconsin in *Torres v. Wisconsin Department of Health and Social Services*, ____ F.Supp. ____, 83-C-627, 628, 629 (E.D.Wisc. August 6, 1984) in which he addressed this question. *Torres* was an action by male employees of the Wisconsin Department of Health and Social Services challenging the validity of a bona fide occupational qualification plan of the department. The suit alleged that the creation and implementation of the plan was arbitrary and capricious; that it discriminated against males on the basis of sex; and that it had an adverse impact on plaintiffs in that they had been demoted. Plaintiffs brought suit under Title VII challenging the validity of the plan; under 42 U.S.C §§ 1985 and 1986 based on an alleged conspiracy among the defendants to interfere with plaintiffs' civil rights; and under 42 U.S.C § 1983 based on actions of the individual superintendent in implementing the bona fide occupational qualification plan. In a well reasoned opinion, Judge Warren dismissed plaintiffs claims for relief under Sections 1983, 1985 and 1986, concluding that "Congress intended that Title VII of the Civil Rights Act of 1964 provide the exclusive set of remedies for discrimination in employment."

The court agrees with the reasoning and the result in *Torres*. As was noted by Judge Warren:

> The upshot of [*Novotny*, *Brown*, *Sea Clammers* and *Prieiser* v. *Rodriguez*, 411 U.S. 475 (1973)]—and the central principle that animates today's ruling—is that a reasonably elaborate, structurally-intergrated system for remedying wrongs in the public domain, such as that established by Title VII . . . , should provide the exclusive means of enforcement of those rights specifically set forth therein. In a case like the present, where plaintiffs' so-called constitutional allegations are so tied up with their cause of action under Title VII that they are, in the Court's view, nearly unidentifiable as discrete claims, the principle articulated in *Novotny*, *Brown*, *Preiser*, and *Sea Clammers* is wisely followed.

Id. at ____, slip op. at 17-18.

The remaining counts in plaintiffs' complaint are all, in the court's view, claims for employment discrimination which are actionable under Title VII. Adopting the reasoning in *Torres*, plaintiffs cannot bring an action under Section 1983 to redress what are in effect Title VII claims. To allow plaintiffs to seek relief under Section 1983 would permit them to completely bypass the comprehensive administrative scheme of Title VII "by the simple expedient of putting a different label on [the] pleadings." Therefore, the court concludes that the remaining counts of the Fourth Amended Complaint, namely Counts II, III and IV, do not state a claim for relief under 42 U.S.C. § 1983.

IV

In conclusion, for the reasons stated above, defendants' motion to dismiss is granted as to all counts of plaintiffs' Fourth Amended Complaint and this suit is dismissed in its entirety.

So ordered.

/s/ GEORGE N. LEIGHTON
George N. Leighton
United States District Judge

Dated: Oct. 18, 1984

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 79 C 2242 Date September 23, 1983

Title of Cause Silas J. Alexander, et al v. Chicago Park District, et al

Brief Statement of Motion Order ruling on plaintiffs' motion made pursuant to Rule 59, Fed. R. Civ. P., for amendment of judgment or for a new trial

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel _____

_____

Representing _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent. _____

_____

Reserve space below for notations by minute clerk

Plaintiffs' motion made pursuant to Rule 59, Fed. R. Civ. P. for an order amending the judgment or for a new trial having been considered by the Court, it is ordered that the motion be denied. The reasons for this ruling are set forth in the Court's Memorandum filed herewith this day.

Leighton, *J.*

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge. Honorable George N. Leighton

Cause No. 79 C 2242 Date September 23. 1983

Title of Cause Silas J. Alexander, et al., vs. Chicago Park District, et al.

Brief Statement of Motion Order ruling on defendants' motion for summary judgment

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (seperate lists may be appended).

Names and Addresses of moving counsel _____

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_____

Representing _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent _____

_____

Reserve space below for notations by minute clerk

Based on the reasons stated in the Court's Memorandum filed this day, defendants motion for summary judgment as to plaintiffs' Counts II, III, and IV of the Third Amended Complaint is denied as to Counts II and III but granted as to Count IV. Further, in conformance with Rule 54(a), Fed. R. Civ. Proc., in order to make final all rulings in this case, and allow the parties to appeal or cross-appeal, Counts II and III of the Third Amended Complaint is dismissed, with leave granted plaintiffs to file a Fourth Amended Complaint either 30 days

from the date of this order or 30 days from the docketing in this court of the mandate of the Court of Appeals from any appeal or cross appeal taken by any party hereto. The right reserved to plaintiffs to file the amended complaint shall be subject to defendants moving against such proposed pleading.

Leighton, *J.*

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois
Eastern Division

SILAS J. ALEXANDER, et al.,
Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,
Defendants.

No. 79 C 2242
Before the Honorable
George N. Leighton
U. S. District Judge

Memorandum

This cause is before the court on a motion by defendants pursuant to Rule 56, Fed. R. Civ. P., in which they ask this court to enter judgment in their favor as to Counts II, III, and IV of plaintiffs' Third Amended Complaint. The motion is attached to this Memorandum as Appendix A; and in order to avoid unnecessary repetition, the allegations, the grounds, and the arguments in support of the motion, are incorporated by reference as if set forth herein *haec verba.*

Counts II, III, and IV of plaintiffs' Third Amended Complaint, the claims they assert, and the allegations made therein, are attached to this Memorandum as Appendix B. In order to avoid unnecessary repetition, the allegations of those counts and the claims they assert are incorporated by reference as if set forth herein *haec verba.*

This civil rights class suit was consolidated with another, Midwest Community Council, Inc., 79 C 3187, an order having been entered prior to trial providing that the verdict in this case would be mandatory while the verdict in *Midwest Community Council, Inc.* was to be advisory. After 37 days of hearing evidence over a period of nearly three months, and deliberation over a period of five days, the jury returned a verdict in favor of

all defendants and against each plaintiff. A copy of that verdict is attached to this memorandum as Appendix C; and in order to avoid unnecessary repetition, it is incorporated by reference as if set forth herein *haec verba*.

The jury trial was by order of this court restricted to Count I of plaintiffs' Second Amended Complaint, a count which in substance is identical with Coun I of their Third Amended Complaint. Count I of the Second Amended Complaint is attached to this Memorandum as Appendix D; and in order to avoid unnecessary repetition the allegations and the claims made therein are incorporated by reference as if set forth in this herein *haec* verba.

The court has heard the parties and their submissions in support of and in opposition to defendants' motion for summary judgment. Being fully advised concerning their respective positions, it rules as follows:

1. Defendants' motion for summary judgment on Counts II and III is denied. The jury's verdict in favor of all defendants and against each plaintiff in Count I of the Second Amended Complaint is not res judicata of the issues raised by the allegations contained in Counts II and III of the Third Amended Complaint. There are material issues of fact to be resolved raised by the allegations of those counts and the answers thereto of the defendants. Count I, which has been tried, alleged that the Chicago Park District, a municipal corporation, its General Superintendent, and its Commissioners, operated the park system in a manner that discriminated against Negroes, Hispanics, and poor residents of the City of Chicago on the basis of race in the allocation of park recreational resources. Counts II and III of the Third Amended Complaint allege that the same defendants have denied the plaintiffs named in those counts employment opportunities because of their race, nationalty, and the fact that they are poor residents of the City of Chicago. For these reasons, as to

Counts I and II of the Third Amended Complaint, defendants are not entitled to judgment as a matter of law under Rule 56, Fed. R. Civ. P.

2. Defendants alternative motion for partial summary judgment as to individual liability claims in Counts II and III is denied. The record in this case lacks the necessary evidentiary support for the contention that the individual commissioners defendants did nothing more than exercise legislative functions in connection with the administration of the property and business of the Chicago Park District, a municipal corporation. Therefore, the commissioners defendants are not entitled to judgment as a matter of law on plaintiffs' individual liability claims against them alleged in Counts II and III of the Third Amended Complaint.

3. Defendants' motion for summary judgment as to Count IV of the Third Amended Complaint is granted and judgment is entered in favor of all defendants and against each plaintiff. This suit as to Count IV is dismissed. The legal basis of plaintiffs' claim under this count, asserted pursuant to 42 U.S.C. § 1983, is that the defendants so administered the Chicago Park District system that the conditions in the parks used predominantly by Negroes, Hispanics and poor people became dangerous, causing personal injury to the plaintiffs in Count IV of the Third Amended Complaint. The issue whether defendants, during the period in question, administered the Chicago Park District system in a racially discriminatory manner in the allocation of park resources was adjudicated against the plaintiffs by the jury's verdict in favor of all defendants and against all of the plaintiffs in Count I of the Second Amended Complaint. For this reason, plaintiffs cannot again litigate with defendants the issue of race discrimination in the allocation of park resources within the Chicago Park District system. Accordingly, defendants are entitled to judgment as a matter of law as to Count IV of the Third Amended Complaint.

4. Defendants' alternative motion for partial summary judgment will be granted only to the extent of providing that when Counts II and III of the Third Amended Complaint is tried, plaintiffs will not be permitted, in opening statement, in the presentation of evidence, in arguments to the jury, or in instructions to be requested, to either directly or indirectly relitigate with defendants the issue whether in the administration of the Chicago Park District system the Chicago Park District, its General Superintendent, and its commissioners, discriminated against Negroes, Hispanics, and poor people in the allocation of park resources which included finances, facilities, programs, and maintenance.

5. In order to enable the parties to this cause to appeal or cross appeal, and in conformance with Rule 54(b), Fed. R. Civ. P., Counts II and III of the Third Amended Complaint are dismissed, subject to the right of plaintiffs to file a Fourth Amended Complaint either thirty (30) days after this date or thirty (30) days after the mandate of the Court of Appeals from any appeal or cross appeal in this case is docketed with the Clerk of this court.

So ordered.

/s/ GEORGE N. LEIGHTON
George N. Leighton,
United States District Judge

Dated: Sep. 23, 1983

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 79C2242 Date Aug. 17, 1983

Title of Cause Alexander *vs* Chicago Park District

Brief Statement of Motion verdict

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (seperate lists may be appended).

Names and Addresses of moving counsel _____

_____

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Representing _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent. _____

_____

Reserve space below for notations by minute clerk

Filed verdict with regard to Count I, we, the jury, find for all of the defendants and against each of the plaintiffs. Enter judgment on the verdict. Jury discharged.

Leighton, *J.*

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 19, 1985

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*

Hon. JESSE E. ESCHBACH, *Circuit Judge*

Hon. EUGENE A. WRIGHT, *Senior Circuit Judge**

SILAS ALEXANDER, et al.,
Plaintiffs-Appellants,

No. 84-2995 vs.

CHICAGO PARK DISTRICT, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 2242

George N. Leighton, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART and REVERSED IN PART, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

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* The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, KAREN TURNER, RENEE BRADFORD, LILLIAN SCHREAN, JOEL ALEXANDER, EARLINE OGLESBY, MARTHA McGEE, ALTHEA TUCKER, ROSEMARY GARRETT, LATOSKI McCARTHY DILLON, BEVERLY GRAY, individually and as mother of ANTHONY GRAY, a minor, ARLENE GASTON, individually and as mother of WILLIE GASTON, a minor, ANGEL GOMEZ, individually and as father of JUAN GOMEZ, a minor, LUIS DIAZ, LUIS FLORES, COMITE LATINO, CLARA EVANS, CHRISTOPHER DELANO BARNETT, OSCAR WELLS, TERRY LEE FISHER, AGNES BERNAUGH, WILLIAM HALL, CHARLES ADKINS, and NATALIE LYLE, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, PATRICK O'MALLEY, THEODORE JONES, JEAN FORAN, WILLIAM A. LEE, SYDNEY MAROVITZ, IOLA McGOWAN, WILLIAM C. BARTHOLOMAY, and RAYMOND F. SIMON, as Commissioners of the Chicago Park District and in their individual capacities; JOHN McHUGH, in his representative capacity only; EDMUND KELLY, as General Superintendent of the Chicago Park District, and individually,

Defendants.

NO: 79 C 2242

FOURTH AMENDED COMPLAINT IN SIX COUNTS

COUNT I—VIOLATIONS OF DEPARTMENTAL FUNDING REGULATIONS, FOR WHICH SECTION 1983 RELIEF SOUGHT

1. This claim is brought by the plaintiffs to enforce the regulations of the Department of Housing and Urban Development, 24 C.F.R. 570.60 *et. seq.*, and of the Department of the Interior, 43 C.F.R. 17.1 *et. seq.*, relating to non-discrimination in federally assisted programs and activities and pursuant to 42 U.S.C. Section 1983, for the relief granted thereby.

2. The court has jurisdiction of this claim under 28 U.S.C. 1343(3).

3. Plaintiffs in this Count I are SILAS J. ALEXANDER, KAREN TURNER, RENEÉ BRADFORD, LILLIAN SCHREAN, JOEL ALEXANDER, EARLINE OGLESBY, MARTHA MC GEE, ALTHEA TUCKER, ROSEMARY GARRETT, LATOSKI MC CARTHY DILLON, BEVERLY GRAY, individually and as mother of ANTHONY GRAY, a minor, ARLENE GASTON, individually and as mother of WILLIE GASTON, a minor, ANGEL GOMEZ, individually and as father of JUAN GOMEZ, a minor, LUIS DIAZ, LUIS FLORES, COMITE LATINO, CLARA EVANS, CHRISTOPHER DELANO BARNETT, OSCAR WELLS, TERRY LEE FISHER, AGNES BERNAUGH, WILLIAM HALL, CHARLES ADKINS and NATALIE LYLE. Each individual plaintiff is a black, Latino or poor resident of the City of Chicago. COMITE LATINO is an organization whose purposes include among others, securing the rights of Latino persons to fair and non-discriminatory municipal services, housing and employment opportunities.

4. Each plaintiff sues on his or her own behalf and on behalf of all other black, Latino and poor residents of Chicago who are injured by the various acts of discrimination alleged herein. This is a proper class action under Rule 23(b)(2), Federal Rules of Civil Procedure. The class is so numerous that

joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiffs will fairly and adequately protect the interests of the class. In addition, the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

5. Defendant CHICAGO PARK DISTRICT is a municipal corporation. Defendants O'MALLEY, LEE, MAROVITZ, FORAN and JONES were at all times pertinent hereto prior to May 1, 1979, Commissioners of the PARK DISTRICT, charged by law with the ultimate responsibility for the conduct of its affairs. Defendant SIMON was a Commissioner from 1979 to 1982. Defendants BARTHOLOMAY, MAROVITZ, MC GOWAN, LEE and MC HUGH are currently Commissioners of the CHICAGO PARK DISTRICT. Defendant KELLY was at all times pertinent hereto and is currently General Superintendent of the PARK DISTRICT.

6. Defendants O'MALLEY, LEE, MAROVITZ, FORAN, JONES, BARTHOLOMAY, MC GOWAN, LEE, SIMON and KELLY are each being sued in their individual and representative capacities. Defendant MC HUGH is being sued only in his representative capacity.

7. The defendant CHICAGO PARK DISTRICT, through its Commissioners and officers, is charged by law with the duty "to manage and control the officers and property of such DISTRICT". (Ill. Rev. Stat., Chapter 105, Section 8-1).

8. Pursuant to its powers the defendant PARK DISTRICT maintains and operates park and park facilities in various parts of the City of Chicago, develops and administers programs for the various parks, assigns staff and personnel, provides funding and police protection and promulgates ordinances and resolutions controlling the operation and use of the parks and facilities.

9. The defendant CHICAGO PARK DISTRICT received federal financial assistance from about 1970 to 1980 for the use and operation of its park system, said federal assistance being authorized pursuant to certain federal statutes including, *inter alia*, 42 U.S.C. Section 5301 *et. seq.*; and 16 U.S.C. Section 460 1 (1) *et seq.*

10. The defendant CHICAGO PARK DISTRICT as a federally funded program or activity is subject to the provisions of 24 C.F.R. 570.600 *et. seq.* and 43 C.F.R. 17.1 *et. seq.*

11. The defendant CHICAGO PARK DISTRICT, and its Commissioners and officers have expended said federal financial assistance in a racially and ethnically discriminatory manner in violation of the regulations of the Departments of Housing and Urban Development and Interior and 42 U.S.C. Section 1983.

12. Defendants have pursued and continue to pursue policies and practices which discriminate against black, Latino and poor residents of the City of Chicago. These discriminatory policies and practices include but are not limited to:

(a) providing substantially fewer recreational facilities to parks located in predominantly black, Latino and poor communities as opposed to those located in predominantly white communities;

(b) providing substantially fewer instructional programs at parks located in predominantly black, Latino and poor communities as opposed to those located in predominantly white communities;

(c) providing substantially fewer recreational staff to parks located in predominantly black, Latino and poor communities as opposed to those located in predominantly white communities; and

(d) providing substantially less maintenance to parks located in predominantly black, Latino and poor communities as opposed to those located in predominantly white communities.

13. The injury to the plaintiffs herein and to the members of their class as a result of the discriminatory practices hereinbefore described is irreparable and plaintiffs and the members of their class will continue to be irreparably injured unless the relief requested by this Complaint is promptly granted. Any other relief to which these plaintiffs and members of their class might be remitted would be attended by such uncertainties and delay as to be a denial of substantial relief.

WHEREFORE, plaintiffs respectfully request:

That this court enter a judgment declaring that defendants' policies and practices have been and continue to be in violation of 24 C.F.R. 570.600 *et. seq.* and 43 C.F.R. 17.1 *et. seq.*, and award to plaintiffs such relief as the law, including but not limited to 42 U.S.C. Section 1983 provides, including that:

(a) Defendants be permanently enjoined from continuing to pursue the discriminatory practices complained of;

(b) Defendants be ordered to submit a plan to this court which would correct the effects of their past violations of federal law;

(c) Defendants pay costs and attorneys' fees; and

(d) the court grant plaintiffs such other relief as the interests of justice may require.

COUNT II—EMPLOYMENT DISCRIMINATION VIOLATIVE OF CONSTITUTION AND SUBSTANTIVE PROVISIONS OF 42 U.S.C. 1983

14. This is a claim in equity for employment discrimination seeking injunctive relief, reinstatement, back-pay and damages, brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Article I, Section 2 of the Illinois Constitution, and 42 U.S.C. 1983.

15. Plaintiffs in this Count II are EARLINE OGLESBY, MARTHA MC GEE, ALTHEA TUCKER, ROSEMARY GARRETT, CHRISTOPHER DELANO BARNETT and TERRY LEE FISHER. Each plaintiff sues on his or her own behalf and on behalf of all other black residents of Chicago who are injured by the various acts of discrimination alleged herein. This is a proper class action under Rule 23(b)(2), Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiffs will fairly and adequately protect the interests of the class. In addition, the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

16. Defendants in this Count II are the CHICAGO PARK DISTRICT, O'MALLEY, JONES, FORAN, LEE, MAROVITZ, MC GOWAN, SIMON, KELLY AND BARTHOLOMAY, in both their individual and representative capacities, and MC HUGH in his representative capacity only.

17. The defendant CHICAGO PARK DISTRICT, through its Commissioners and officers, is charged by law with the duty "to manage and control the officers and property of such DISTRICT" (Ill. Rev. Stat., Chapter 106, Section 8-1), in the discharge of which governmental function the PARK DISTRICT is subject to the guarantees of due process and equal protection of the laws provided by the Fourteenth Amendment to the United States Constitution, and to the provisions of Article I, Section 2 of the Illinois Constitution which requires that "no person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws".

18. As of November 1, 1977 and on the date of filing this Complaint the defendant PARK DISTRICT included among its job classifications the title "physical instructor", and within

that job classification differentiated between persons employed as "monthly" and "hourly" personnel. Monthly personnel are salaried employees entitled, among other things, to full-time employment, to accrue vacation, sick leave, seniority and pension rights, and are paid at rates significantly higher than hourly personnel, whose hours of employment are varied at the discretion of the PARK DISTRICT, who accrue no vacation, sick leave, seniority or pension rights, and who are paid at rates significantly lower than for monthly personnel.

19. Plaintiffs MC GEE, TUCKER, GARRETT, FISHER, and others similarly situated were, on November 1, 1977 and had been for several years before, employed by the PARK DISTRICT as physical instructors within the sub-classification of "monthly" personnel. Plaintiff OGLESBY and others similarly situated were on November 1, 1977, and had been for several years before, employed by the PARK DISTRICT as physical instructors within the sub-classification of "hourly" personnel. Plaintiff BARNETT immediately prior to examination was employed by the PARK DISTRICT as a "physical instructor". On the date of the examination plaintiff BARNETT was employed by the PARK DISTRICT as a "recreation leader" and was compensated as an "hourly" employee.

20. On or about November 10, 1977 plaintiffs were notified by defendants that a "civil service examination" would be administered to plaintiffs and others similarly situated on or about the following December 10, 1977 and that successful taking of the examination would be the basis upon which physical instructors would obtain or retain job security benefits and pay preferences in future. Plaintiffs were further informed that the examination would consist of two parts, the first written and the second "practical", and further, that the two portions of the examination would be administered on different days, with the written portion to be given at a later date only to persons who would be notified that they had successfully passed the written examination.

21. Plaintiffs took the written portion of the examination on or about December 10, 1977, at Whitney Young High School in Chicago. The written examination itself consisted of two parts, the first substantially an intelligence quotient test, and the second substantially a test of technical knowledge. Neither test was in fact job-related and neither was reasonably calculated to identify and determine the presence or absence in the persons tested of those skills required to function in the job of physical instructor, which job plaintiffs had been successfully performing for a number of years with satisfactory ratings from their superiors.

22. Plaintiffs were notified during January, 1977 that the "practical" examination would be administered during February, 1978, and proceeded to take that examination in February, 1978 at the Whitney Young High School. The practical examination was itself divided into two parts, the first of which involved answering several verbal questions having, at best, a tangential relationship to the knowledge required to perform the job of physical instructor. In the second part of the examination many of the examinees were required to demonstrate limited skills in certain designated activities at various "stations" set up for that purpose, which activities included, for example, serving a volleyball and shooting a basketball.

23. The attitudes and actions of the PARK DISTRICT personnel who administered both the written and the practical examinations were characterized by levity and lack of serious concern over consistency, objectivity or accuracy of evaluation of the examinations. The monitors and examiners were in all cases supervisory level PARK DISTRICT employees who, in many cases, were personally acquainted with and friends of the persons examined by them. Further, no responsible steps were taken by the defendants to eliminate cultural or racial bias or favoritism, or to assure objectivity, accuracy and consistency in administering and evaluating the tests, nor were responsible steps taken to assure that the examination was appropriately job-related.

24. During May, 1978 plaintiffs MC GEE, TUCKER, GARRETT, FISHER and OGLESBY were notified that they had failed the examination. Plaintiffs, however, continued to perform their jobs as "monthly" and "hourly" physical instructors, respectively. Plaintiff BARNETT was notified that he passed the examination.

25. On or about August 10, 1978 plaintiffs MC GEE, TUCKER, GARRETT and FISHER, all "monthly" salaried physical instructors entitled to full benefits, were notified by defendants that they were terminated and that upon completing work the following day, they should begin their vacations and not thereafter report to work. Plaintiff OGLESBY, who was an "hourly" physical instructor and who also had been notified in May of her failure to pass the examination, was not terminated but continued to be employed by the defendants performing the job of physical instructor, but accruing no benefits, vacation or pension rights, and being entitled to no job security. Plaintiff BARNETT was retained as an "hourly recreational leader".

26. A disproportionately high number of the physical instructors terminated for "lack of occupational proficiency" by reason of their purported failure to pass the "civil service examination" were monthly salaried employees entitled to benefits. A disproportionately high number of those so terminated were black, and a disproportionately high number of those were female.

27. Since August, 1978, defendants have retained plaintiff OGLESBY and others similarly situated, who also "failed" the examination, as hourly physical instructors, and have hired additional hourly physical instructors and rehired previous monthly physical instructors as hourly physical instructors, among both categories of whom blacks are a disproportionately high number. Defendants have further discriminated during the period 1978 to 1981 by hiring and retaining a majority of white persons for the position of "*Special Recreation Activity Instructor*", for which no "civil service examination" is required.

28. Since November, 1977, by means of an examination not reasonably job-related, not reasonably free of cultural, racial and sexual bias, and administered under such circumstances as not to assure objectivity, impartiality, accuracy or consistency, defendants have engaged in a pattern of behavior evincing a design and intent to (1) eliminate large numbers of black salaried physical instructors entitled to job benefits; (2) of those retained or rehired, to eliminate their entitlement to job benefits and security, (3) to replace such terminated or demoted black employees with employees disproportionately white, to whom job benefits and security are provided in disproportionate numbers.

29. By reason of the aforesaid behavior of defendants, plaintiffs MC GEE, TUCKER, GARRETT, FISHER and others similarly situated have been discriminated against and wrongfully terminated from their jobs, have been deprived of their property without due process of law and have been denied the equal protection of the laws, all in violation of the Constitution and Laws of the United States and the State of Illinois.

30. By reason of the aforesaid behavior of defendants, plaintiffs OGLESBY, BARNETT and others similarly situated have been discriminated against and (1) wrongfully paid less than others performing the same work, with similar skills, and (2) denied benefits, including accrual of vacation, pension rights, sick leave and pension benefits provided to others performing the same work. Plaintiffs OGLESBY, BARNETT and others similarly situated have as a result been deprived of property without due process and denied the equal protection of the laws, all in violation of the Constitution and Laws of the United States and the State of Illinois.

31. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged and this suit for injunctive relief, reinstatement, back pay and damages is the only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendants' policies, practices, customs and usages of discrimination against blacks.

WHEREFORE, plaintiffs respectfully request that this Court enter a temporary injunction, of the scope outlined below, advance this case on the docket, order a speedy hearing at the earliest practicable date, cause the case to be in every way expedited, and upon such hearing:

(a) Permanently enjoin defendants, their officers, agents, successors, employees, attorneys and those acting in concert with defendants from continuing or maintaining the policy and practice of discriminating against plaintiffs and other similarly situated;

(b) Declare the "civil service test" administered to plaintiffs by defendants to be invalid and void, and permanently enjoin defendants from denying plaintiffs employment on the basis of the said test, and denying them status as salaried employees entitled to full benefits;

(c) Reinstate as "monthly" employees entitled to all benfits plaintiffs MC GEE, TUCKER, GARRETT, FISHER and others similarly situated, and award them back pay and benefits for the period from their wrongful termination to the date of the Court's remedial order herein;

(d) Order that plaintiff OGLESBY and others similarly situated be accorded status as salaried physical instructors entitled to full benefits, effective retroactively to the date determined by the Court to be the date, in each case, when the status should have been accorded them;

(e) Order that plaintiff BARNETT and others similarly situated be awarded back pay retroactively for the period beginning with the date when they should have been appointed and paid as physical instructor.

(f) Award plaintiffs their costs, expenses and attorneys' fees herein and such other and additional relief as may appear reasonable and just.

COUNT III—EMPLOYMENT DISCRIMINATION VIOLATIVE OF DEPARTMENT FUNDING REGULATIONS, FOR WHICH SECTION 1983 RELIEF SOUGHT

32.-33. Plaintiffs re-allege paragraphs 1 and 2 of Count I.

34.-36. Plaintiffs re-allege paragraphs 15 and 16 of Count II.

37.-40. Plaintiffs re-allege paragraphs 7, 8, 9 and 10 of Count I.

41. The defendants CHICAGO PARK DISTRICT and its Commissioners and officers have expended said federal financial assistance in a racially and ethnically discriminatory manner, as set forth in the following paragraphs of this Count in violation of the regulations of the Departments of Housing and Urban Development and Interior.

42.-51. Plaintiffs re-allege paragraphs 18 through 27 of Count II.

52. Since November, 1977, by means of an examination not reasonably job-related, not reasonably free of cultural, racial and sexual bias, and administered under such circumstances as not to assure objectivity, impartiality, accuracy or consistency, defendants have engaged in a pattern of behavior which seeks to (1) eliminate large numbers of black salaried physical instructors entitled to job benefits; (2) of those retained or rehired, to eliminate their entitlement to job benefits and security, (3) to replace such terminated or demoted black employees with employees disproportionately white, to whom job benefits and security are provided in disproportionate numbers.

53. By reason of the aforesaid behavior of defendants, plaintiffs MC GEE, TUCKER, GARRETT, FISHER and others similarly situated have been discriminated against and wrongfully terminated from their jobs.

54. By reason of the aforesaid behavior of defendants, plaintiffs OGLESBY, BARNETT and others similarly situated have been discriminated against and (1) wrongfully paid less than others performing the same work, with similar skills, and (2) denied benefits, including accrual of vacation, pension rights, sick leave and pension benefits provided to others performing the same work.

55. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged, and this suit for injunctive relief, reinstatement, back pay and damages is the only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendants' policies, practices, usages and customs of discrimination against blacks.

WHEREFORE, plaintiffs respectfully request that this Court enter a temporary injunction, of the scope outlined below, advance this case on the docket, order a speedy hearing at the earliest practicable date, cause the case to be in every way expedited, and upon such hearing:

(a) Permanently enjoin defendants, their officers, agents, successors, employees, attorneys and those acting in concert with defendants from continuing or maintaining the policy and practice of discriminating against plaintiffs and others similarly situated;

(b) Declare the "civil service test" administered to plaintiffs by defendants to be invalid and void, and permanently enjoin defendants from denying plaintiffs employment on the basis of the said test, and denying them status as salaried employees entitled to full benefits;

(c) Reinstate as "monthly" employees entitled to all benefits plaintiffs MC GEE, TUCKER, GARRETT, FISHER and others similarily situated, and award them back pay and benefits for the period from their wrongful termination to the date of the Court's remedial order herein;

(d) Order that plaintiff OGLESBY and others similarly situated be accorded status as salaried physical instructors entitled to full benefits, effective retroactively to the date determined by the Court to be the date, in each case, when the status should have been accorded them;

(e) Order that plaintiff BARNETT and others similarly situated be awarded back pay retroactively for the period beginning with the date when they should have been appointed and paid as physical instructors;

(f) Award plaintiffs their costs, expenses and attorneys' fees herein and such other and additional relief as may appear reasonable and just.

COUNT IV—EMPLOYMENT DISCRIMINATION VIOLATIVE OF CONSTITUTION AND SUBSTANTIVE PROVISIONS OF 42 U.S.C. 1983

56. This is a claim in equity for employment discrimination seeking injunctive relief, back pay and damages, brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Article I, Section 2 of the Illinois Constitution, and 42 U.S.C. 1983.

57. Plaintiffs in this Count III are EARLINE OGLESBY, MARTHA MC GEE, ALTHEA TUCKER, ROSEMARY GARRETT, KAREN TURNER, OSCAR WELLS, CHRISTOPHER DELANO BARNETT, RENÉE BRADFORD, CHARLES ADKINS, WILLIAM HALL, LUIS DIAZ, NATALIE LYLE, and AGNES BERNAUGH, all of whom are current or former black and Latino employees of the PARK DISTRICT, and COMITE LATINO. Each plaintiff sues on his or her own behalf and on behalf of all other black and Latino residents of Chicago who are injured by the various acts of discrimination alleged herein. This is a proper class action under Rule 23(b)(2), Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracti-

cable; there are questions of law and fact common to the class; the claims of the named plaintiffs will fairly and adequately protect the interest of the class. In addition, the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

58. Defendants in this Count III are the CHICAGO PARK DISTRICT, O'MALLEY, JONES, FORAN, LEE, MAROVITZ, MC GOWAN, SIMON, KELLY and BARTHOLOMAY, in both their individual and representative capacities, and MC HUGH in his representative capacity only.

59. The defendant CHICAGO PARK DISTRICT, through its Commissioners and officers, is charged by law with the duty "to manage and control the officers and property of such DISTRICT" (Ill. Rev. Stat., Chapter 105, Section 8-1), in the discharge of which governmental function the PARK DISTRICT is subject to the guarantees of due process and equal protection of the laws provided by the Fourteenth Amendment to the United States Constitution, and to the provisions of Article I, Section 2 of the Illinois Constitution which requires that "no person shall be deprived of life, liberty or property without due process law nor be denied the equal protection of the laws".

60. Pursuant to its powers, the defendant PARK DISTRICT maintains and operates parks and park facilities in various parts of the City of Chicago, develops and administers programs for the various parks, assigns staff and personnel, provides funding, secures police protection and promulgates ordinances and resolutions controlling the operation and use of the parks and facilities.

61. The defendant PARK DISTRICT has, through the actions of its Board of Commissioners and its officers and agents, including the individual defendants herein, developed and maintained a policy, practice, custom and usage of hiring,

assigning and promoting its employees on the basis of race and ethnic background in that, in part, the PARK DISTRICT has perpetuated "white" parks and facilities in white communities, to which white employees are assigned in disproportionately high numbers, and, in part, by excluding blacks and persons of Latino descent from the upper administrative positions in the PARK DISTRICT.

62. Similarly, defendants have developed and maintained a policy of establishing and perpetuating "black" and "Latino" parks and facilities in black and Latino communities, to which blacks and Latinos are assigned either exclusively or in disproportionately high numbers. Conversely, blacks and Latinos are routinely, and as a matter of policy, practice, custom and usage denied the opportunity to transfer, be assigned to or be promoted into jobs located at white parks in white communities.

63. At the same time, defendants have for several years developed and maintained a policy and practice of allocating funds to parks on a discriminatory basis, with a high correlation between larger allocations of funds and predominantly white communities.

64. Similarly, and as a result, the assignment of administrative, recreational, support and maintenance staff varies substantially from park to park with a high correlation between greater numbers and higher quality of personnel assigned and predominance of whites in the communities served, and a similarly high correlation between lower numbers and lower quality of staff assigned and predominance of blacks and persons of Latino descent in the communities served. Facilities serving minority communities have substantially fewer experienced staff and personnel of all types than do facilities serving predominantly white communities. Also, and as a result of the policy, practice, custom and usage of assigning and promoting its employees on the basis of race and ethnic

background, blacks and person of Latino descent are denied the opportunity to hold upper administrative positions in the PARK DISTRICT on the same basis as whites.

65. The fact that significantly less funds are allocated to black and Latino parks, and substantially fewer staff assigned to them than to white parks, combined with the policy, custom and practice of defendants of hiring, assigning and paying personnel on a racially and ethnically discriminatory basis, produces the result that black and Latino employees are forced to compete against others for fewer jobs commanding less funds than those available to their white counterparts, which fact has caused defendants to devise such expedients as the "civil service examination" described in Counts II and III hereto for the purpose of reducing the number of the DISTRICT's black and Latino employees, and effectively reducing their rate of pay by creating large numbers of hourly employees in black and Latino parks.

66. As a further result of defendants' aforesaid policy, practice, custom and usae, plaintiffs KAREN TURNER, LUIS DIAZ and others similarly situated have been forced to resign from the employ of the PARK DISTRICT, due to their realization that their opportunities for reassignment, higher pay and promotions were severly limited by reason of defendants' limiting blacks and Latinos to employment, assignment, pay and promotions within the context of black and Latino parks, or have been wrongfully terminated. The aforesaid policy, practice, custom and usage of defendants have deprived and continue to deprive plaintiffs of property without due process of law, and have denied and continue to deny them the equal protection of the laws in violation of the Constitution and Laws of the United States and the State of Illinois.

67. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged and this suit for a permanent injunction, reinstatement of some plaintiffs, back pay and damages, is their only means of securing adequate

relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendants' policy, practice, custom and usage of discrimination against blacks and Latinos with respect to hiring, assignment and promotion.

WHEREFORE, plaintiffs respectfully request that this Court enter a temporary injunction of the scope outlined below, advance this case on the docket, order a speedy hearing at the earliest practicable date, cause the case to be every way expedited, and upon such hearing:

(a) Permanently enjoin defendants, their officers, agents, successors, employees, attorneys, and those acting in concert with defendants from continuing maintaining the policy and practice of discriminating against Plaintiffs and others similarly situated with respect to any aspect of employment, including hiring, assignment, pay and promotion.

(b) Reinstate plaintiffs TURNER, DIAZ and others similarly situated, and award them back pay and benefits for the period from their wrongful coerced resignations to the date of the Court's remedial order.

(c) Award all plaintiffs back pay based on what their pay would have been if they had been permitted to compete freely for employment, assignment, equal pay and promotion from the date of their employment to the date of the Court's remedial order.

(d) Allow plaintiffs their costs and expenses herein, including reasonable attorneys' fees and such other and additional relief as may appear reasonable and just.

COUNT V—EMPLOYMENT DISCRIMINATION VIOLATIVE OF DEPARTMENTAL FUNDING REGULATIONS, FOR WHICH SECTION 1983 RELIEF SOUGHT

68.-69. Plaintiffs re-allege paragraphs 1 and 2 of Count I.

70.-71. Plaintiffs re-allege paragraphs 38 and 39 of Count IV.

72.-75. Plaintiffs re-allege paragraphs 7, 8, 9 and 10 of Count I.

76. The defendant, CHICAGO PARK DISTRICT, and its Commissioners and officers have expended said federal financial assistance in a racially and ethnically discriminatory manner, as set forth in the following paragraphs of this Count.

77.-81. Plaintiffs reallege paragraphs 46, 47, 48, 49 and 50.

82. As a further result of defendant's aforesaid policy, practice, custom and usage, plaintiffs KAREN TURNER, LUIS DIAZ, and others similarly situated have been forced to resign from the employ of the PARK DISTRICT, due to their realization that their opportunities for reassignment, higher pay and promotions were severely limited by reason of defendants' limiting blacks and Latinos to employment, assignment, pay and promotions within the context of black and Latino parks, or have been wrongfully terminated.

83. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged, and this suit for a permanent injunction, reinstatement of some plaintiffs, back pay and damages, is their only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendants' policy, practice, custom and usage of discrimination against blacks and Latinos with respect to hiring, assignment and promotion.

WHEREFORE, plaintiffs respectfully request that this Court enter a temporary injunction of the scope outlined below, advance this case on the docket, order a speedy hearing at the earliest practicable date, cause the case to be in every way expedited, and upon such hearing:

(a) Permanently enjoin defendants, their officers, agents, successors, employees, attorneys, and those acting in concert with defendants from continuing or maintaining the policy and practice of discriminating against plaintiffs and others similarly situated with respect to any aspect of employment, including hiring, assignment, pay and promotion.

(b) Reinstate plaintiffs TURNER, DIAZ and others similarly situated, and award them back pay and benefits for the period from their wrongful coerced resignations to the date of the Court's remedial order.

(c) Award all Plaintiffs back pay based on what their pay would have been if they had been permitted to compete freely for employment, assignment, equal pay and promotion from the date of their employment to the date of the Court's remedial order.

(d) Allow Plaintiffs their costs and expenses herein, including reasonable attorneys' fees and such other and additional relief as may appear reasonable and just.

COUNT VI—GENERAL VIOLATIONS OF DEPARTMENTAL FUNDING REGULATIONS RESULTING IN PERSONAL INJURIES, FOR WHICH SECTION 1983 AND OTHER RELIEF SOUGHT

84.-85. Plaintiffs re-allege paragraphs 1 and 2 of Count I.

86. Plaintiffs in this Court VI are JUAN GOMEZ, a minor, by his father ANGEL GOMEZ; ANTHONY GRAY, a minor, by his mother BEVERLY GRAY; WILLIE GASTON, a minor, by his mother ARLENE GASTON, and COMITE LATINO. Each plaintiff sues on his or her own behalf and on behalf of all black and Latino residents of Chicago who are injured by the discrimination alleged herein. This is a proper class action under Rules 23(b)(2) and (3), Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiffs will fairly and adequately protect the interests of the class. In addition, the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

87. Defendants in this Count IV are CHICAGO PARK DISTRICT, O'MALLEY, JONES, FORAN, LEE, MARO-

VITZ, MC GOWAN, SIMON, KELLY and BARTHOLOMAY, in both their individual and representative capacities, and MC HUGH in his representative capacity only.

88. The defendants, CHICAGO PARK DISTRICT and its Commissioners and officers have expended said federal financial assistance in a racially and ethnically discriminatory manner in violation of the regulations of the Departments of Housing and Urban Development and Interior and 42 U.S.C. Section 1983. Specifically, parks and facilities which principally serve neighborhoods which are predominantly inhabited by black, Latino and poor persons receive substantially less maintenance, staff aid and safety inspections and reviews than do parks serving neighborhoods which are predominantly inhabited by white persons. As a result, substantial hazardous conditions are created and continue to exist in parks located in neighborhoods which serve primarily black, Latino and poor neighborhoods with resultant personal injuries to minority park patrons.

89. Among the facilities and services operated by the defendant PARK DISTRICT is a recreational area and swimming pool known as "Wentworth Gardens", located in a Chicago Housing Authority project at 37th Street and Wentworth Avenue in Chicago, Illinois. The Wentworth Gardens recreational complex and swimming pool is controlled, staffed, equipped and operated by the CHICAGO PARK DISTRICT on behalf of the Chicago Housing Authority.

90. On or about June 16, 1979 the minor plaintiffs herein swam in the pool at Wentworth Gardens. At that time, in keeping with their policy, practice, custom and usage of providing inferior staff, maintenance, equipment and supplies to parks and facilities under the PARK DISTRICT's control located in predominantly black and Latino neighborhoods, personnel of the PARK DISTRICT neglected to clean and maintain the pool, and had as a result attempted to compensate for that fact

by introducing into the water large quantities of chlorine and similar chemicals which were so concentrated as to be toxic and unsafe.

91. As a result thereof, plaintiffs were exposed to and ingested unsafe and hazardous quantities of chlorine, by reason of which they became ill, suffered internal and external injury, have required medical treatment, and have suffered substantial pain, suffering and discomfort.

92. At all times pertinent hereto, plaintiffs exercised that degree of due care for their own safety prescribed by law, and were in no way negligent.

93. The injuries sustained by plaintiffs and others similarly situated were the direct and proximate result of the racially and ethnically discriminatory policies of defendants whereby parks and facilities operated by defendants in black, Latino and poor neighborhoods are deliberately poorly maintained, staffed and funded, thereby causing dangerous conditions to exist and continue in the subject parks and facilities with the result that injuries including but not limited to the kind sustained by plaintiffs are frequently sustained by blacks, Latinos and poor persons who use the said parks and facilities.

94. As well as being unlawful, the acts of defendants described herein are also tortious behavior actionable in this class action claim brought by plaintiffs on their own behalf and on behalf of all others similarly situated who have sustained personal injury by reason of the conditions created by defendants' behavior.

WHEREFORE, plaintiffs respectfully request that this Court:

(a) Award actual and punitive damages to plaintiffs in the amounts of TWENTY-FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS each;

(b) Award actual and punitive damages, as indicated by the proof upon trial, to all other members of the class as allowed by law;

(c) Award plaintiffs their costs and attorneys' fees;

(d) Grant such other relief as justice and equity may require.

SILAS J. ALEXANDER, KAREN TURNER, RENEE' BRADFORD, LILLIAN SCHREAN, JOEL ALEXANDER, EARLINE OGLESBY, MARTHA MC GEE, ALTHEA TUCKER, ROSEMARY GARRETT, LATOSKI MC CARTY DILLON, BEVERLY GRAY, individually and as mother of ANTHONY GRAY, a minor, ARLENE GASTON, individually and as mother of WILLIE GASTON, a minor, ANGEL GOMEZ, individually and as father of JUAN GOMEZ, a minor, LUIS DIAZ, LUIS FLORES, COMITE LATINO, CLARA EVANS, CHRISTOPHER DELANO BARNETT, OSCAR WELLS, TERRY LEE FISHER, AGNES BERNAUGH, WILLIAM HALL, CHARLES ADKINS, and NATALIE LYLE, on behalf of themselves and others similarly situated,

BY: _____

LAW OFFICES OF
RUFUS COOK, LTD.
Their Attorneys

LAW OFFICES OF RUFUS COOK, LTD.
1331 South Michigan Avenue
Chicago, IL 60605
312/461-1093

Dated: October 24, 1983

42 U.S.C. § 2000e. **Definitions**

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee"

shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any govermental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or

related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e-1 **Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies**

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-2. **Unlawful employment practices.**

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would de-

prive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National Security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of

sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-3. **Other unlawful employment practices**

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or

applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

42 U.S.C. § 2000e-4 **Equal Employment Opportunity Commission**

Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

(a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of Title 5 governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and General Schedule pay rates: *Provided*, That assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of Title 5.

General Counsel; appointment; term; duties; representation by attorneys and Attorney General

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall hav responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall

concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

Exercise of powers during vacancy; quorum

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

Seal; judicial notice

(d) The Commission shall have an official seal which shall be judicially noticed.

Reports to Congress and President

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

Principal and other offices

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any

or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

Powers of Commission

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

Cooperation with other departments and agencies in performance of educational or promotional activities

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and

agencies in the performance of such educational and promotional activities.

Personnel subject to political activity restrictions

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of Title 5, notwithstanding any exemption contained in such section.

42 U.S.C. § 2000e-5. **Enforcement provisions**

Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged

unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful

employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent

a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Provision of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to compel compliance with judicial orders

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-6. **Civil actions by Attorney General**

Complaint

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent

or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single-judge district court: hearing, determination, expedition of action

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the

circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

(c) Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

(e) Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or

practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

42 U.S.C. § 2000e-7. **Effect on State laws**

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-8. **Investigations**

Examination and copying of evidence related to unlawful employment practices

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual

interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint

labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General is a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

Prohibited disclosures; penalties

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

42 U.S.C. § 2000e-9 **Conduct of hearings and investigations pursuant to section 161 of Title 29**

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

42 U.S.C. § 2000e-10. **Posting of notices; penalties**

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

42 U.S.C. § 2000e-11. **Veterans' special rights or preference**

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

42 U.S.C. § 2000e-12. **Regulations; conformity of regulations with administrative procedure provisions; reliance on interpretations and instructions of Commission**

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5.

(b) In any action or proceding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

42 U.S.C. § 2000e-13. **Application to personnel of Commission of sections 111 and 1114 of Title 18; punishment for violation of section 1114 of Title 18**

The provisions of sections 111 and 1114, Title 18, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of Title 18, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

42 U.S.C. § 2000e-14. **Coordination of efforts and elimination of competition among Federal departments, agencies, etc. in implementation and enforcement of equal employment opportunity legislation, orders, and policies; report to President and Congress**

The Equal Employment Opportunity Commission shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 of each year, the Equal Employment Opportunity Commission shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

42 U.S.C. § 2000e-15 **Presidential conferences; acquaintance of leadership with provisions for employment rights and obligations; plans for fair administration; membership**

The President shall, as soon as feasible after July 2, 1964, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

42 U.S.C. § 2000e-16. **Employment by Federal Government**

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Enforcement powers of Commission; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity

plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 2000e-5(f) through (k) of this title applicable to civil actions

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

42 U.S.C. § 2000e-17 **Procedure for denial, withholding, termination, or suspension of Government contract subsequent to acceptance by Government of affirmative action plan of employer; time of acceptance of plan**

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5, and the following pertinent sections: *Provided*, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: *Provided further*, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

Supreme Court, U.S.
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No. 85-1342

In the

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO PARK DISTRICT, et al.,

Petitioners,

v.

SILAS J. ALEXANDER, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Where this Court, and each appellate court which has considered the issue, has concluded that Title VII, 42 U.S.C. Section 2000e et seq., unequivocally preserves the right of state and local government employees to bring actions for race discrimination in employment under the Fourteenth Amendment Equal Protection Clause and Section 1983, should a petition for certiorari which seeks a contrary ruling be granted?

PARTIES TO PROCEEDING

The named plaintiffs in this class action include:

> Silas J. Alexander, Karen Turner, Reneé Bradford, Lillian Schrean, Joel Alexander, Earline Oglesby, Martha McGee, Althea Tucker, Rosemary Garrett, Latoski McCarthy Dillion, Beverly Gray, Anthony Gray, Arlene Gaston, Willie Gaston, Angel Gomez, Juan Gomez, Luis Diaz, Luis Flores, Comite Latino, Clara Evans, Christopher Delano Barnett, Oscar Wells, Terry Lee Fisher, Agnes Bernaugh, William Hall, Charles Adkins, Natalie Lyle.

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IN THE

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OCTOBER TERM, 1985

No. 85-1342

CHICAGO PARK DISTRICT, et al.,

Petitioners,

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SILAS J. ALEXANDER, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, SILAS J. ALEXANDER, ET AL. ("ALEXANDER"), in accordance with Rule 22 of the Supreme Court Rules, hereby respectfully submit their BRIEF in OPPOSITION to the Petition for Writ of Certiorari of the CHICAGO PARK DISTRICT, ET AL. ("DISTRICT").

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1985. A petition for rehearing was denied November 13, 1985. The DISTRICT, invoking this court's jurisdiction under 28 U.S.C. 1254 (1), filed a Petition for

Certiorari which was received by ALEXANDER on February 10, 1986. ALEXANDER'S BRIEF IN OPPOSITION thereto is submitted pursuant to Rule 22 of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend XIV, Sec. 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Sec. 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The text of 42 U.S.C. Section 2000e to 2000e-17 is set forth in the DISTRICT's Appendix, at p. 67a.

STATEMENT OF CASE

On October 24, 1984, the trial court, *inter alia*, dismissed those counts of the ALEXANDER Complaint, pending

since 1979, in which the DISTRICT was charged with racial and ethnic employment discrimination in violation of the Fourteenth Amendment. The court dismissed these counts on the ground that Title VII of the Civil Rights Act, as amended, 42 U.S.C. Section 2000e et seq., preempted ALEXANDER's right to sue the District for violation of their constitutional right to be free of race discrimination in employment. (The trial court's order appears at page 16a of the DISTRICT's Appendix.)

On November 20, 1984, ALEXANDER appealed, *inter alia*, the dismissal of the employment discrimination counts to the Seventh Circuit. On September 19, 1985, the Seventh Circuit affirmed certain portions of the trial court's order, but reversed the district court's dismissal of the employment discrimination counts, holding that they were not preempted by Title VII, and remanded them for trial. (The opinion of the Court of Appeals appears at page la of the DISTRICT's Appendix).

On October 3, 1985, the DISTRICT filed a Petition for Rehearing respecting dismissal of the employment discrimination counts. On November 13, 1985, the Seventh Circuit modified certain language in its earlier order (not here relevant), but denied the DISTRICT's Petition for Rehearing, in which it had argued that Title VII preempts the right of state and local government employees to bring suit for race discrimination in employment under the Equal Protection Clause.

On February 10, 1986, the DISTRICT filed a Petition for Writ of Certiorari delimited to the issue of Title VII's preemptive effect. ALEXANDER has filed a cross-petition seeking review of the question whether the trial judge's denial of the ALEXANDER for disqualification contravenes 28 U.S.C. Sections 144 and 455 (a).

I.

REASONS FOR DENYING THE WRIT

THE *NOVOTNY* DECISION AND OTHER DECISIONS OF THIS COURT REFUTE THE PROPOSITION THAT TITLE VII AFFORDS THE EXCLUSIVE REMEDY TO STATE AND LOCAL GOVERNMENT EMPLOYEES WHO SUE THEIR EMPLOYER FOR RACE DISCRIMINATION.

The DISTRICT argues that this Court's decision in *Great American Federal Savings and Loan Association* v. *Novotny*, 442 U.S. 336 (1979) limits state and local government employees to Title VII as a means of redressing racial discrimination in employment. The narrow holding of that case fails to support the DISTRICT'S contention. *Novotny*, a male, sued his private employer in federal court, charging intentional denial of equal employment opportunities for female employees. *Novotny* predicated his first cause of action on 42 U.S.C. Section 1985 (3), claiming he was entitled to damages because he had been injured as the result of a conspiracy to "deprive him of equal protection of, and equal privileges and immunities under the laws." In his second cause, he alleged that his discharge was in retribution for his efforts on behalf of equal employment opportunity in violation of Section 704 (a) of Title VII. This Court held that the deprivation of a right *created* by Title VII cannot be the basis for a cause of action under Section 1985(3). In so ruling, the Court first noted that Section 1985(3) provides no substantive rights; it merely provides a remedy for rights it designates. The Court then stressed that the legislative history of Title VII makes clear that *although causes of action under 42*

U.S.C. Section 1981 and 1983 are not preempted, the legislative history is silent regarding 42 U.S.C. Section 1985(3).

> During the course of the legislative debates on both the Civil Rights Act of 1964 and the 1972 Amendments to the 1964 Act, the view was consistently expressed that the earlier statutes would not be implicitly repealed (cite). Specific references were made to Section 1981 and 1983, but, significantly, no notice appears to have been taken of Section 1985 . . . 442 U.S. at 377, n.21.

The Court also pointed out that the situation in *Novotny* differs markedly from other cases in which it has been held that the violation of *substantive rights conferred by the Constitution* are actionable under nineteenth century civil rights laws (i.e.: the right to be free from racial discrimination in public accommodations, 42 U.S.C. 2000(a)) and have not been withdrawn, *sub silentio,* by the subsequent passage of modern statutes. *Novotny's* statutory claims under Section 704(a) (proscription against retaliation) did not even arguably exist before the passage of Title VII. In light of the fact that the legislative history of Title VII is silent regarding preservation of remedies *under 42 U.S.C. Section 1985(3)*, the Court was unwilling to permit *Novotny* to avoid Title VII's proscription of compensatory damages and trial by jury.

The distinctions between *Novotny* and *Alexander* are many and manifest:

> (1) *Novotny's* claim was brought against a *private* employer; ALEXANDER sued the DISTRICT, which satisfies the "state action" requirement of Section 1983:
>
> (2) Because Novotny sued a *private* employer, not the state, for sex discrimination, Novotny could not

utilize the Fourteenth Amendment which requires "state action". Moreover, *Novotny* alleged ***no other constitutional violations*** (e.g. violation of First Amendment right of association.) *Novotny* based his Section 1985(3) claim solely on a violation of Title VII's anti-retaliation provision (Section 724)

In contrast to *Novotny*:

(1) ALEXANDER charges *race* discrimination, not sex discrimination;

(2) ALEXANDER *does not* allege violation of Title VII or sue under Section 1985(3);

(3) ALEXANDER instead sues under Section 1983; and the legislative history of Title VII makes clear that remedies made available under Section 1983 (unlike Section 1985(3)) are not preempted by Title VII;

(4) ALEXANDER alleges violations of "fundamental constitutional rights" which exist wholly independent of Title VII, including:

> (a) the Fourteenth Amendment right not to be deprived of property or of a liberty interest to engage in an occupation without due process of law (see: *Diulio* v. *Board of Fire and Police Commissioners*, 682 F.2d 666, 668, 669 (7th Cir. 1982));
>
> (b) the Thirteenth Amendment right of black citizens to be free from involuntary servitude (see: *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971)); and,
>
> (c) the right of black citizens to contract without impairment (as provided for by the Civil Rights Act of 1866, now codified at 42 U.S.C. Section 1981).

The inapplicability of *Novotny* to case like ALEXANDER, which charge violation of fundamental constitutional guaranties, was ably articulated by the court in *Skade-*

gaard v. *Farrell,* 575 F.Supp. 1209, 1215-1218 (D.N. J. 1984):

> Plaintiff has alleged violations of her rights under the Fourteenth Amendment for which she seeks relief via Section 1985(3) and 1983. Plaintiff's constitutional rights are undeniably "independent" of those provided in Title VII and, in fact, pre-dated the creation of rights under its statutory scheme by close to one hundred years . . . The plaintiff in *Novotny* was precluded from asserting similar claims under the Fourteenth Amendment because he was employed by a private employer . . . Here, by virtue of plaintiff Skadegaard's state employment, she has additional and independent rights vis-a-vis her employer which she has asserted.

In summary, then, *Novotny* fails to support the DISTRICT'S position that Title VII is preemptive because, as pointed out by the Court in footnote 21 of its opinion, the legislative history of Title VII treats Sections 1981 and 1983 markedly different from Section 1985(3), and Novotny, unlike ALEXANDER, could not allege a violation of the Equal Protection Clause by his *private* employer.

It should also be noted that the Court's *Novotny* decision is consistent with two earlier decisions, in each of which, after review of Title VII's legislative history, the Court concluded that Title VII does not preempt the remedies afforded by nineteenth century civil rights laws. In *Alexander* v. *Gardner-Denver, Co.,* 415 U.S. 36, 47-49 (1974), the Court was required to decide whether an employee who pursued a grievance to a final adverse arbitration decision forfeited his private cause of action under Title VII. The district court had ruled that to permit an employee to do so would be giving "the employee two

strings to his bow" when the employer only has one. In reversing, the Court, as noted, analyzed the legislative history of Title VII:

> . . . legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue, independently, his rights under Title VII and other applicable state and federal statutes. . . The clear inference is that Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination.

In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, (1975), decided the following year, the Court used even stronger language in holding that Title VII does not preempt actions under Section 1981:

> . . . Congress noted "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, and that the two procedures augment each other and are not mutually exclusive". H.R. Rep. No. 92-236, p. 19 (1971), U.S. Code Cong. & Admin. News, 1972, pp. 2137, 2154. See also S.Rep. No. 92-415, p. 24 (1971).

II.

THE SEVENTH CIRCUIT, AND EACH CIRCUIT WHICH HAS CONSIDERED THE ISSUE, HAS CORRECTLY CONCLUDED THAT TITLE VII IS NOT THE EXCLUSIVE REMEDY AVAILABLE TO STATE AND LOCAL GOVERNMENT EMPLOYEES SUBJECTED TO RACE DISCRIMINATION.

In reversing the trial court, the Seventh Circuit did not discuss applicable case law, but instead cited to and

relied upon its decision in *Trigg* v. *Fort Wayne Community Schools,* 766 F.2d 299 (7th Cir. 1985), which was decided three weeks after ALEXANDER was argued. In *Trigg,* the court reviewed the legislative history of Section 2 of the Equal Employment Opportunity Act of 1972 and concluded therefrom that Congress, in amending Title VII in 1972, among other things, to bring "state and local government employees" within the Act's protection, specifically preserved the existing right of such employees to sue for discrimination in employment under Section 1983, 766 F.2d 301.

Actual examination of the legislation history is instructive. The legislative history of the 1972 amendments to Title VII, Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Act of 1972, H.R. 1746 Pub. L. No. 92-261* (Comm. Print 1972) [hereinafter "Legislative History"], extends to *2,067 pages,* and reflects Congressional debate on twenty-eight (28) days. In adopting the 1972 amendments, Congress passed the House bill (H.R. 1746), not the Senate bill (S.2915). See: H.R. Rep. No. 92-238, 92d Cong., 2d Sess. P. 2137. The House bill which became law contains no provision repealing the rights of "state and local government employees" to sue the "state" for employment discrimination under Section 1983. Instead, the legislative history of H.R. 1746 provides:

> In establishing the applicability of Title VII to state and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. sections 1981 and 1983, is in no way affected. During the floor debate surrounding the passage of Title VII of the Civil

Rights Act of 1964, it was made clear that the Act was not intended to preempt existing rights under the National Labor Relations Act or the Railway Labor Act. Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination. Two recent court decisions, *Young* v. *International Telephone and Telegraph Co.*, —— F.2d —— 3 FEP Cases 145 (3d Cir. 1970) and *Saunder* v. *Dobbs House,* 431 F.2d 1097 (5th Cir. 1970), have affirmed this Committee's belief that the remedies available to an individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, and that the two procedures augment each other and are not mutually exclusive. The bill, therefore, by extending jurisdiction to state and local government employees does not affect existing rights that such individuals have already been granted by previous legislation.

The expansion of Title VII coverage to state and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination. Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill. *Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated "under color of state law" as embodied in the Civil Rights Act of 1871, 42 U.S.C. Section 1983.* (Emphasis Supplied.) Legislative History, p. 78[illegible].

At no point in the 2,067 page legislative history is this explicit expression of Congressional intent retracted or modified, a fact which the DISTRICT provides no authority to dispute. Moreover, on February 8, 1972, Senator Hruska (Neb.) proposed Amendment No. 877 to S. 2515 which sought to make Title VII the "exclusive remedy". It stated:

> Except as provided in subsection (b) through (e), (n) and (g) of this section, Section 707 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e-6), as amended, and the Equal Pay Act of 1963 (29 U.S.C. 206(d)(1)), a charge filed hereunder shall be the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of any employer, employment agency, or labor organization. Legislative History, p. 1382.

Senator Hruska's amendment was rejected by the Senate on February 9, 1972 Id. 1406-07, and rejected on reconsideration on February 15, 1972 Id. 1520-21.

Thus, as the Seventh Circuit concluded, review of the legislative history of Title VII dictates summary rejection of the DISTRICT'S preemption agreement. Moreover, notwithstanding the DISTRICT'S argument to the contrary, the Sixth Circuit decision in *Day* v. *Wayne County Board of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984), decided a year before *Trigg*, and the Fifth Circuit decision in *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 534, n.4 (5th Cir. 1982), pressage and are consistent with the Seventh Circuit's decisions in *Trigg* and *ALEXANDER*.

III.

REINSTATING THE ALEXANDER EMPLOYMENT DISCRIMINATION COUNTS, THE SEVENTH CIRCUIT FAILED TO DISCUSS THE SEA CLAMMERS AND SMITH v. ROBINSON DECISIONS SIMPLY BECAUSE NEITHER CASE SUPPORTS THE DISTRICT'S POSITION THAT STATE AND LOCAL GOVERNMENT EMPLOYEES ARE LIMITED TO TITLE VII TO REDRESS RACIAL DISCRIMINATION

The DISTRICT argues that the Seventh Circuit ignored this Court's decisions in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association,* 453 U.S. 1 (1981) and *Smith* v. *Robinson,* —— U.S. ——, 104 S.Ct. 3457 (1984), DISTRICT Petition, at 9. The DISTRICT fails to note, however, that it futilely attempted to convince the Seventh Circuit both in its brief *and* in its Petition for Rehearing, even as it attempts to convince this Court now, that the *Sea Clammers* and *Smith* v. *Robinson* decisions require the conclusion that Title VII affords ALEXANDER the exclusive remedy to redress the government's race discrimination. Neither case supports the DISTRICT'S contention. In *Sea Clammers* the Court held that plaintiffs could not use Section 1983 because (1) the *legislative history* of the environmental statutes at issue there (unlike that of Title VII) makes clear that Congress intended plaintiffs suing thereunder to be limited exclusively to the remedies set forth in those statutes; and (2) the existence of comprehensive express remedies demonstrated Congress' intent to supplant any remedy that might be available under Section 1983.

Again, contrary to the DISTRICT'S assertion that the appellate court failed to consider *Sea Clammers,* in *Trigg,* 766 F.2d 302, the Seventh Circuit cites with approval,

Zewde v. *Elgin Community College*, 601 F.Supp. 1237, 1244-46. (N.D. 1984), wherein the district court persuasively demonstrates the inapplicability of *Sea Clammers* (and for that matter *Novotny*):

> These arguments that *Novotny* and *Sea Clammers* apply here by analogy are flawed. In neither case was the plaintiff asserting constitutional rights or substantive rigths other than those created by Title VII or the FWPCA. Section 1985(3) and 1983 were merely conduits in those cases for asserting the Title VII or FWPCA rights. As such, it made sense to imply a congressional intent to prevent plaintiffs from using artful pleading to evade those statutes' restrictions. The analogy to this case would be powerful if Zewde were merely reasserting his statutory, Title VII rights via the Section 1983 conduit. However, the complaint alleges a *constitutional violation* via Section 1983, not a statutory Title VII violation.
>
> . . . . . the holding and spirit of *Sea Clammers* do not run contrary to our holding. It is one thing to say, as the Supreme Court did in that case, that a comprehensive and specific statute like the FWPCA demonstrates implicit congressional intent to repeal the Section 1983 right of action for violation of that statute. It is quite another thing to say, as Elgin does, that the comprehensive Title VII framework demonstrates implicit Congressional intent to repeal the Section 1983 right of action for concurrent violations of the Constitution. Arguably, courts should require express legislative intent to repeal statutory rights of action for constitutional violations. At the very least, Judges should be more hesitant to find an implied repeal of a constitutional right of action than to find one of a statutory violation. In any event, we do not believe that in passing Title VII Congress meant to repeal the concurrent right of action for Constitutional violations.

As has been demonstrated above, the legislative history of Title VII and of the 1972 amendments thereto, which added state and local employees to its coverage, unequivocally establish that Title VII was not intended to preempt actions brought pursuant to Section 1983. Moreover, the fact that there exists a comprehensive enforcement scheme under Title VII does not mean that fundamental constitutional rights "existing for over a hundred years" are impliedly repealed. Accordingly, *Sea Clammers* fails to support the DISTRICT'S position.

Smith v. *Robinson* also fails to aid the DISTRICT. The issue presented there was whether plaintiffs, who had successfully prosecuted certain claims under the Education of the Handicapped Act (EHA), which does not provide for attorneys' fees, could nonetheless recover fees under 42 U.S.C. Section 1988, as a result of having *asserted* due process and equal protection claims under Section 1983 when the constitutional claims had not been reached by the trial court. The district court awarded fees and the appellate court reversed. Although the appellate court acknowledged the general rule that when the claim upon which a plaintiff actually prevails is accompanied by a "substantial" though undecided Section 1983 claim arising from the same nucleus of facts, a fee award is appropriate, it nevertheless held, citing *Sea Clammers*, that plaintiffs could not recover fees because the EHA creates a comprehensive remedial scheme, and international "omissions" (i.e., provision for fees) should not be supplanted by the remedial apparatus of Section 1983.

In affirming the appellate court, the Supreme Court found that "*both* the structure of the EHA, *and* its legislative history", 104 S. Ct. 3468 (emphasis supplied), estab-

lish Congress intended the EHA to be the exclusive avenue for assertion of an equal protection claim to a publicly financed special education. Even though the Court found EHA's structure "comprehensive" and clear, as it had also found the language of the environmental statutes at issue in *Sea Clammers,* and the language of Section 717 of Title VII (i.e., coverage of federal employees) at issue in *Brown* v. *General Services Administration,* 425 U.S. 820 (1976), the Court nevertheless still examined and found *Congress' intent as revealed by the legislative history to be the dispositive factor.*

> Petitioners insist that . . . Congress specifically indicated that it did not intend to limit the judicial remedies otherwise available to a handicapped child. *If that were true, we would agree with petitioners that Congress intent is controlling and that a Section 1983 remedy remained available to them.* See: *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 459 (1975). *The sentence in the legislative history is not the clear expression of Congressional intent petitioners would like it to be.* 104 S. Ct. 3470, n.16. (Emphasis supplied.)

Analysis of *Smith* v. *Robinson* demonstrates the following errors inherent in the DISTRICT'S reliance thereon:

> 1. The DISTRICT'S contention that it is improper to examine the legislative history of Title VII because its structure is "comprehensive", Petition, at 12, is in direct apposition to the method of analysis employed by this Court in *Sea Clammers,* 453 U.S. 1, 16, n. 26; 17, n. 27, *Brown* v. *General Service Administration,* 425 U.S. 820, 827-28, 834, and *Smith* v. *Robinson,* 104 S. Ct. 3470 n.16.
>
> 2. That the Court also scrutinized Title VII's legislative history in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47-49 (1974), and in *Johnson* v. *Railway Ex-*

press Co., 421 U.S. 454 (1975) establishes conclusively that the Court considers resort to the legislative history of Title VII essential, thereby further negating the DISTRICT'S argument that Title VII's "comprehensiveness" requires suppression of its legislative history.

3. The DISTRICT'S focus on the rule of construction that resort to the legislative history is required only when the statute is unclear, D. Petition, at 12, ignores an equally, if not more salutary rule, that "repeals by implication are not favored" and "the intention to repeal must be clear and manifest; otherwise the later act is to be construed as a continuation and not a substitution for the first act . . .", *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936); *see also*: *Novotny*, 442 U.S. at 391 (1979), and cases cited thereat.

4. *Smith* v. *Robinson*, does not hold as the DISTRICT seems to argue, that allegation of a constitutional violation will not operate to avoid the effects of *Sea Clammers*, *Novotny* and *Brown*. Rather it holds only that, when the legislative history of a statute clearly demonstrates that rights created under it, and the remedies for enforcing it are intended by Congress to be preemptive, then enforcement of those rights must be predicated on the statute, not the equal protection clause and Section 1983; other constitutional rights, however, may be asserted via Section 1983. 104 S. Ct. 3465 n. 7, 3468.

Unlike the statutes at issue in *Sea Clammers* and *Smith* v. *Robinson*, the legislative history of the 1972 Amendments to Title VII, including as it does *specific* language preserving other remedies, and a record of two separate defeats of Senator Hruska's attempt to make Title VII exclusive, negates completely the DISTRICT'S argument that had the Seventh Circuit considered *Smith* v. *Robinson*, the result would have been different.

IV.

THE SEVENTH CIRCUIT'S RULING (AND THE CONGRUENT RULINGS OF THE OTHER CIRCUITS) THAT STATE AND LOCAL GOVERNMENT EMPLOYEES ARE AFFORDED THE ADDITIONAL REMEDY OF SECTION 1983 IS NOT "ANOMALOUS" AS THE DISTRICT ARGUES, BUT IS WARRANTED PRECISELY BECAUSE GOVERNMENTAL EMPLOYEES HAVE SPECIAL STATUS.

The DISTRICT argues that preservation of *state* employees' remedies under Section 1983 creates the "anomalous" situation that state and local government employees are placed in a preferred status over federal and private employees. Petition at 20-21. As noted in ALEXANDER'S Reply Brief and the Brief Opposing Petition for Rehearing filed with and considered by the Seventh Circuit, the DISTRICT'S "anomalous" argument is devoid of merit because of this Court's directive (expressed anew in *Smith* v. *Robinson*) that "the legislative history [of a statute] . . . is controlling". In adopting the 1972 amendments, Congress underscored the special position state and local governments occupy:

> This failure of state and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. *From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone of good government. Discrimination by government therefore serves a doubly destructive purpose.* The exclusion of minorities from effective participation in the bureaucracy not only promotes

> ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often, hostility toward the entire process of government. Legislative History, *supra,* 419. Emphasis supplied.)

It should also be noted that, contrary to the DISTRICT'S contention, *Brown* v. *General Services Administration,* 425 U.S. 820 (1976), which holds that *federal* employees *are* limited to Title VII's remedies, is not "anomalous" in relation to the Seventh Circuit's ruling. In *Brown* the Court held that a black employee of the *federal* government may not use Section 1981, but instead must bring all claims for employment discrimination under Section 717 of Title VII. Analyzing the legislative history of Section 717, the Supreme Court noted that prior to 1972, Title VII did not protect federal employees. Instead, charges of racial discrimination were handled "parochially in each agency", and there was "skepticism among federal employees regarding the Civil Service Commission's record of obtaining . . . adequate remedies". Too, although an action seeking injunctive relief might lie, the doctrine of sovereign immunity made back-pay and compensatory relief largely unavailable. Thus, Congress was persuaded that federal employees had no effective judicial remedy before Section 717 was enacted into law. Accordingly, the Supreme Court found that the legislative history of Section 717 requires the conclusion that Congress intended to create an exclusive, administrative scheme for redress of federal employment discrimination. The Court also found that the "structure" of Section 717 supports its preemptive effect because it details responsibilities for each federal agency, and carefully delineates the administrative responsibilities of the federal Civil Service Commission.

As has been abundantly demonstrated above, the legislative histories of the Civil Rights Act of 1964, and that portion of the 1972 amendments relating to state and local government, are distinguishable from that of Section 717. Moreover, the provisions for agency action and involvement of the Civil Service Commission (i.e., the structure) are unique to federal employees. As a result, the *Brown* decision, instead of supporting the DISTRICT'S theory of the exclusiveness of Title VII, serves to emphasize that Title VII does not preempt ALEXANDER'S Section 1983 claim.

V.

THOSE DISTRICT COURT DECISIONS WHICH HOLD CONTRARY TO THE RULINGS OF THE SEVENTH, SIXTH AND FIFTH CIRCUITS ARE ALSO IN DEROGATION OF THIS COURT'S RULINGS.

At Page 24 of its Petition, the DISTRICT notes that during the past year, before the Seventh Circuit's *Trigg* decision, two district courts (and the *Trigg district court*) held that Title VII affords an exclusive remedy. However, reference to these cases establishes that the analysis (or lack thereof) of these courts is flawed because of the failure to consider the legislative history of Title VII which specifically preserves the Section 1983 rights of state and local government employees, and this Court's decisions which underscore the clarity of Congress' preservation of dual remedies.

VI.

ASSUMING ARGUENDO THAT THE SEVENTH CIRCUIT'S DECISION IS INCORRECT, ALEXANDER'S DISCRIMINATION CLAIMS, FIRST FILED IN 1979, SHOULD NOT BE DEFEATED BY RETROACTIVE APPLICATION OF A RULING THAT TITLE VII IS EXCLUSIVE.

In light of this Court's ruling *in Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971), even if it is assumed arguendo that the Seventh Circuit's decision is incorrect, ALEXANDER'S discrimination claims, first filed in 1979, should not be defeated by retroactive application of a ruling that Title VII is preemptive.

CONCLUSION

For the reasons stated above, ALEXANDER respectfully requests that the DISTRICT'S Petition for Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO PARK DISTRICT, *et al.*,

Petitioners,

v.

SILAS J. ALEXANDER, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh (collectively "Park District") respectfully submit the following reply to the Brief in Opposition to the Park District's Petition for Certiorari submitted by Respondents ("Alexander").

I.

THE ARGUMENTS RAISED IN ALEXANDER'S BRIEF IN OPPOSITION EVINCE THE CONFUSION IN THE STATE OF THE LAW WHICH MILITATES IN FAVOR OF REVIEW BY THIS COURT

A. Introduction

In its Petition for Certiorari, the Park District discussed the Seventh Circuit's misapplication and lack of consideration of this Court's four most analogous recent decisions. The Park District briefly analyzed the holdings and reasoning of and the interplay among this Court's decisions in *Middlesex County Sewerage Authority v. National Sea Clammers Association ("Sea Clammers")*, 453 U.S. 1 (1981), *Smith v. Robinson*, ___ U.S. ___, 104 S.Ct. 3457 (1984), *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979), and *Brown v. GSA*, 425 U.S. 820 (1976). Since the issue presented in the Park District's Petition has never been decided by this Court, the importance of these cases which faced similar questions is clear.

Alexander begins his response by boldly asserting, in his own distortion of the question presented for review, that this Court has already decided the issue in Alexander's favor (Alexander Br. i). Alexander's brief, however, nowhere indicates when or in what case this issue has been decided. Rather, Alexander's brief engages in the same type of narrow consideration of this Court's leading authority as that done by the Seventh Circuit in *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985).[1] Alexander's narrow views of this Court's leading cases evince the confusion in the state of the law on the present issue which is the very reason why review by this Court is necessary and appropriate.

---

[1] As noted in the Park District's Petition for Certiorari, the Seventh Circuit's reversal of Counts II and IV in this case is based almost exclusively on *Trigg*, which was decided by the Seventh Circuit while this case was pending before it. The circuit court opinion in this case does not make an independent analysis of the issue presented here.

B. Both Alexander And The Seventh Circuit Erroneously Interpret This Court's Leading Decisions Narrowly and In Isolation

Alexander and the Seventh Circuit in *Trigg* have viewed the leading decisions of this Court in isolation, arguing that the holding in each case should be limited to the specific facts presented. Both Alexander and the Seventh Circuit have also focused on isolated aspects of the Supreme Court decisions to support their position. As a result, they have both completely overlooked the broad significance of those cases and their direct application to the present issue.

An example of the inappropriately narrow approach taken by Alexander is his treatment of *Novotny*. He begins with the invalid premise that the Park District is arguing that *Novotny* "limits state and local government employees to Title VII as a means of redressing racial discrimination in employment" (Alexander Br. 4). The Park District has made no such argument. What the Park District does argue is that *Novotny* contains many parallels to the present case, and that this Court's analysis of related issues in *Novotny* has an important bearing on the resolution of this case (Pet. for Cert., 16-18). Moreover, the Park District does not characterize *Novotny* as a controlling decision. Rather *Novotny* is one of several recent decisions of this Court which enunciate limitations on the use of older Civil Rights Acts which conflict with newer, more specific federal remedies. Alexander nevertheless characterizes *Novotny* as a narrow holding (Alexander Br. 4). He attempts to distinguish the decision by claiming that a footnote in *Novotny* instructs that Sections 1983 and 1985(3) are to be afforded fundamentally different treatment despite their many similarities (Alexander Br. 5, 7). That argument is both false and illogical, as the footnote merely distinguishes *Novotny* from two older decisions of the Court, neither of which involved Section 1983 or Section 1985(3). *Novotny*, 442 U.S. at 377, n.21.

In his zeal to distinguish *Novotny*, Alexander has even attempted to rewrite his complaint in his brief. Alexander claims that he has alleged not only due process violations, but also violations of the Thirteenth Amendment and of "the right of black citizens to contract without impairment," the latter allegedly asserted under 42 U.S.C. § 1981 (Alexander Br. 6). These claims are not alleged in any count of the Fourth Amended Complaint or in any other count of any other complaint ever filed in this case by Alexander.

The confusion underlying Alexander's approach to this Court's prior decisions is even more evident in his attempt to distinguish *Sea Clammers*. Alexander states that in *Sea Clammers* the Court supposedly held that a Section 1983 remedy was unavailable because "the *legislative history* of the environmental statute at issue there (unlike that of Title VII) makes clear that Congress intended plaintiffs suing thereunder to be limited exclusively to the remedies set forth in those statutes." (Alexander Br. 12) (emphasis in original). Later in his brief, Alexander refers to a footnote in *Sea Clammers* which he asserts supports this statement (Alexander Br. 15).

In fact, as the Park District underscored in its Petition for Certiorari, the legislative history of *Sea Clammers* indicates just the opposite of what Alexander contends. (*See* Pet. for Cert. 13-14). The footnote in *Sea Clammers* cited by Alexander refers to a Senate Report which states that the new statute "would specifically preserve any rights or remedies under any other law." S.Rep. No. 92-414, 92d Cong. 2d Sess. 81, *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3746. *Sea Clammers* was decided as it was *despite* legislative history apparently to the contrary, not because of the legislative history as Alexander claims.

Alexander's sole argument in opposition to the Park District's Petition for Certiorari is his claim that Title VII legislative history controls the present issue to the exclusion of

all other considerations. He therefore has narrowly focused his own discussion of this Court's previous decisions to place undue emphasis on any discussion of legislative history in the opinions. He thus extolls the *Sea Clammers* legislative history, which actually undercuts his argument that this Court considers legislative history to be the controlling factor in determining the intent of Congress. Alexander also overstates the importance of legislative history in the *Smith v. Robinson* and *Brown v. GSA* decisions. (*See* Alexander Br. 15.) Contrary to Alexander's argument, however, legislative history was not "the dispositive factor" in either case. In *Brown v. GSA*, the Court did look at the legislative history of Title VII, but did so with the specific purpose of determining what Congress' perception of the prior state of the law was, 425 U.S. at 828, and not to find a way to contravene what the statute itself provides as Alexander is advocating in his brief. The Court in *Brown v. GSA* was also quick to point out that the structure of the statute and the legislative history were completely consistent with one another. 425 U.S. at 829. In *Smith v. Robinson*, as in *Sea Clammers*, a statement in the legislative history intimated that other remedies were *not* pre-empted by the new legislation. The Court concluded that Congress intended to pre-empt the prior inconsistent remedy despite that language. 104 S.Ct. at 3470.

The structure and language of Title VII at issue here strongly militate against the position taken by Alexander. Congress did not intend that state or local government employees are free to chose whether or not they will subvert Title VII by proceeding directly into court by designating their pleading as a Section 1983 claim. Using the approach enunciated by this Court in *Sea Clammers*, it is readily apparent that Congress has indicated its intent to pre-empt Section 1983 under the particular circumstances at issue here by providing a detailed and comprehensive remedy in Title VII.

Alexander's gross inflation of the significance of this Court's considerations of legislative history is a transparent attempt to distract this Court's attention from the more significant aspects of those decisions of the Court which have the most direct bearing on this case. Those decisions, when viewed together, reveal that the Seventh Circuit's decisions in this case and in *Trigg* were erroneous. *Smith v. Robinson* and *Sea Clammers*, neither of which was addressed by the Seventh Circuit, strongly indicate that plaintiffs may not subvert Title VII's comprehensive scheme by simply labelling their claim as one to redress a constitutional deprivation. This Court should grant the Park District's Petition so that the confusion that remains among lower courts and litigants over how this Court's analogous decisions apply to the present issue can be eliminated.

II.

CONCLUSION

The issue presented in the Park District's Petition is far from settled. As the Park District demonstrated in its Petition, the precise issue presented here has arisen in many reported lower court cases in the last few years with directly conflicting results. *See* Pet. for Cert. 22-25. Although Alexander attempts to inflate a footnote from a Fifth Circuit decision and vague dictum from the Sixth Circuit into overwhelming authority in his favor (Alexander Br. 11), there is no consensus on this issue. A review of the issue by this Court would settle an important question of federal law which is likely to be faced frequently by the lower courts. The Park District respectfully requests that its Petition be granted.

Respectfully submitted,

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